12-28-2007

Neighbors for Resp. Growth v. Kootenai Co. Clerk's Record v. 3 Dckt. 34591

LAW CLERK Vol. 3 of 4

IN THE SUPREME COURT
OF THE STATE OF IDAHO

NEIGHBORS FOR RESPONSIBLE
GROWTH, ET AL.
Plaintiffs/Responsible,

vs

KOOTENAI COUNTY, ET AL.

Defendants,

and

POWDERHORN COMMUNITIES, LLC, ET AL,

Interveners/Appellants,

and

COEUR D'ALENE COMPANY, ET AL,

Interveners

CLERK'S RECORD ON
APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT OF IDAHO, IN AND
FOR THE COUNTY OF KOOTENAI

ATTORNEY FOR APPELLANTS
John F. Magnuson
Mischelle Fulgham

ATTORNEY FOR RESPONDENTS
Scott Reed
Patrick Braden

SUPREME COURT DOCKET 34591 & 34592

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34591-34592

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STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED 4:01 PM

2007 MAY 16 PM 4:01

CLERK DISTRICT COURT
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Attorneys for Intervenors Powderhorn Communities LLC and Heartland LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unicorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unicorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON,

Plaintiffs,

v.

KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants,

and

POWDERHORN COMMUNITIES LLC, and HEARTLAND LLC; COEUR D'ALENE LAND COMPANY; and H.F. MAGNUSON,

Intervenors/Respondents.

NO. CV-06-8574

NOTICE OF HEARING OK

438

NOTICE IS HEREBY GIVEN that on Tuesday, June 5, 2007, at the hour of 3:30 p.m., or as soon thereafter as counsel may be heard, in the Courtroom of the above entitled Court, 324 West Garden Avenue, Coeur d'Alene, Idaho, before the Honorable Charles W. Hosack, the Court will hear argument on the merits of Petitioners' Petition for Judicial Review.

DATED this 15th day of May, 2007.

LUKINS & ANNIS, P.S.

By _____
MISCHELLE R. FULGHAM
ISB #4623
PETER J. SMITH IV
ISB #6997
Attorneys for Intervenors Powderhorn Communities LLC and Heartland LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Scott W. Reed Attorney at Law 401 Front St P. O. Box A Coeur d' Alene, ID 83816	☐ ☐ ☐ ☑	Hand-delivered First-Class Mail Overnight Mail Facsimile – 208-765-5117
John A. Cafferty Kootenai County Legal Services P. O. Box 9000 Coeur d'Alene, ID 83816	☐ ☐ ☐ ☑	Hand-delivered First-Class Mail Overnight Mail Facsimile – 208-446-1621
John F. Magnuson Attorney At Law 1250 Northwood Center Ct Suite A P. O. Box 2350 Coeur d'Alene, ID 83816	☐ ☐ ☐ ☑	Hand-delivered First-Class Mail Overnight Mail Facsimile – 208-667-0500

MISCHELLE R. FULGHAM

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED:
2007 MAY 16 PM 4:01
CLERK DISTRICT COURT
DEPUTY

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Attorneys for Intervenors Powderhorn Communities LLC and Heartland LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unicorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unicorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON,

Plaintiffs,

v.

KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants,

and

POWDERHORN COMMUNITIES LLC, and HEARTLAND LLC; COEUR D'ALENE LAND COMPANY; and H.F. MAGNUSON,

Intervenors/Respondents.

NO. CV-06-8574

AMENDED NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that on Thursday, May 31, 2007, at the hour of 10:00 a.m., or as soon thereafter as counsel may be heard, in the Courtroom of the above entitled Court, 324 West Garden Avenue, Coeur d'Alene, Idaho, before the Honorable Charles W. Hosack, Intervenors Powderhorn Communities LLC and Heartland LLC will call on for hearing their Motion to Dismiss Due to Lack of Jurisdiction, Objection to Amended Petition for Judicial Review/Motion to Strike Amended Petition, and Motion to Dismiss the Alternative Motion to Amend, which were previously scheduled to take place on June 5, 2007, at 3:30 p.m.

DATED this 15th day of May, 2007.

LUKINS & ANNIS, P.S.

By _____
MISCHELLE R. FULGHAM
ISB #4623
PETER J. SMITH IV
ISB #6997
Attorneys for Intervenors Powderhorn Communities LLC and Heartland LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of May, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Scott W. Reed Attorney at Law 401 Front St P. O. Box A Coeur d' Alene, ID 83816	☐ ☐ ☐ ☑	Hand-delivered First-Class Mail Overnight Mail Facsimile – 208-765-5117
John A. Cafferty Kootenai County Legal Services P. O. Box 9000 Coeur d'Alene, ID 83816	☐ ☐ ☐ ☑	Hand-delivered First-Class Mail Overnight Mail Facsimile – 208-446-1621
John F. Magnuson Attorney At Law 1250 Northwood Center Ct Suite A P. O. Box 2350 Coeur d'Alene, ID 83816	☐ ☐ ☐ ☑	Hand-delivered First-Class Mail Overnight Mail Facsimile – 208-667-0500

MISCHELLE R. FULGHAM

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

2007 MAY 16 PM 4:00

CLERK DISTRICT COURT
DEPUTY

MISCHELLE R. FULGHAM
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ISB #6997
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Attorneys for Intervenors Powderhorn Communities LLC and Heartland LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unicorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unicorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON,

Plaintiffs,

v.

KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants,

and

POWDERHORN COMMUNITIES LLC, and HEARTLAND LLC

Intervenors/Respondents.

NO. CV-06-8574

OBJECTION TO ALTERNATIVE MOTION FOR LEAVE TO AMEND PETITION FOR JUDICIAL REVIEW

INTERVENORS POWDERHORN COMMUNITIES LLC and HEARTLAND LLC object to Plaintiffs Alternative Motion for Leave to Amend filed on or about April 9, 2007. The objection and motion to strike are based upon I.R.C.P. 15, I.R.C.P. 84(b), Idaho Code § 67-5273 and Idaho Code § 67-6521. Although leave to amend is liberally granted under Rule 15, Petitioners seek to add a declaratory relief claim, which lacks merit and is not within the limited, appellate jurisdiction of this Court reviewing a Petition for Judicial Review. Additionally, under Rule 84(b), I.C. § 67-5273, and I.C. 67-6521, more than 28 days have elapsed since the Commissioners issued their order. Petitioners' proposed Alternative Amended Petition is untimely. Petitioners Alternative Motion for Leave to Amend, seeking to add an invalid and untimely declaratory relief claim, should be denied. Intervenors respectfully request that this Court so order.

Oral argument at the May 31, 2007 hearing is requested.

DATED this 16th day of May, 2007.

LUKINS & ANNIS, P.S.

By _____
MISCHELLE R. FULGHAM, ISB #4623
PETER J. SMITH IV, ISB #6997
Attorneys for Intervenors Powderhorn Communities LLC and Heartland LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Scott W. Reed Attorney at Law 401 Front St P. O. Box A Coeur d' Alene, ID 83816	☐ ☐ ☐ ☑	Hand-delivered First-Class Mail Overnight Mail Facsimile – 208-765-5117
John A. Cafferty Kootenai County Legal Services P. O. Box 9000 Coeur d'Alene, ID 83816	☐ ☐ ☐ ☑	Hand-delivered First-Class Mail Overnight Mail Facsimile – 208-446-1621
John F. Magnuson Attorney At Law 1250 Northwood Center Ct., Suite A P. O. Box 2350 Coeur d'Alene, ID 83816	☐ ☐ ☐ ☑	Hand-delivered First-Class Mail Overnight Mail Facsimile – 208-667-0500

MISCHELLE R. FULGHAM
PETER J. SMITH IV

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED
8C408
2007 MAY 21 PM 4:09
CLERK DISTRICT COURT
DEPUTY

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ISB #4270

Attorney for Intervenors Coeur d'Alene Land Company and
H. F. Magnuson

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON,

Plaintiffs/Petitioners,

vs.

KOOTENAI COUNTY, a political subdivision of the State of Idaho acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants/Respondents,

NO. CV-06-8574

NOTICE OF HEARING

and

POWDERHORN COMMUNITIES, LLC, HEARTLAND, LLC, COEUR D'ALENE LAND COMPANY, and H. F. MAGNUSON,

Intervenors/Respondents.

TO: CLERK OF THE COURT;

TO: ALL PARTIES ABOVE NAMED

AND TO ALL ATTORNEYS OF RECORD

You and each of you will please take notice that Intervenors, Coeur d'Alene Land Company and H. F. Magnuson, will call their Motion to Dismiss and Objection to Alternative Motion for Leave to Amend Petition for Judicial Review on for hearing before the Honorable Charles W. Hosack, District Judge, on May 31, 2007, at 10:00 a.m. at the Kootenai County Courthouse. You are invited to attend and participate as you see fit.

Dated this 21st day of May, 2007.

JOHN F. MAGNUSON
Attorney for Intervenors Coeur d'Alene Land Co. and Harry F. Magnuson

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served upon the following, **via facsimile and U.S. Mail, postage prepaid** this 21st day of May, 2007:

Scott W. Reed
Attorney at Law
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CDALAND HFM - NOT HRG.wpd

STATE OF IDAHO }SS
COUNTY OF KOOTENAI
FILED:
2007 MAY 21 PM 4:08
CLERK DISTRICT COURT
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Attorney for Intervenors Coeur d'Alene Land Company and H. F. Magnuson

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON,

Plaintiffs/Petitioners,

vs.

KOOTENAI COUNTY, a political subdivision of the State of Idaho acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants/Respondents,

NO. CV-06-8574

MOTION TO DISMISS BY INTERVENORS COEUR D'ALENE LAND COMPANY AND H. F. MAGNUSON

450

and

POWDERHORN COMMUNITIES, LLC, HEARTLAND, LLC, COEUR D'ALENE LAND COMPANY, and H. F. MAGNUSON,

Intervenors/Respondents.

COME NOW Intervenors Coeur d'Alene Land Company and H. F. Magnuson, by and through their counsel of record, John F. Magnuson, and respectfully move the Court, pursuant to IRCP 15, IRCP 84(b), and Idaho Code §§ 67-5273 and 67-6521 for entry of an order dismissing the "Amended Petition for Judicial Review" filed by Plaintiffs/Petitioners on February 5, 2007. This Motion is supported by the pleadings and submissions on file herein. The argument advanced by Intervenors in support of the Motion was set forth in the Response Brief which they caused to be filed on May 4, 2007, at pages 14-19 (copies of which are attached hereto as Exhibit A and incorporated herein as though set forth in full).

Dated this 21st day of May, 2007.

JOHN F. MAGNUSON
Attorney for Intervenors Coeur d'Alene Land Co. and Harry F. Magnuson

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served upon the following, **via facsimile and U.S. Mail, postage prepaid** this 21st day of May, 2007:

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these substantial changes, admitting that "rapidly increasing growth and development" has far exceeded "projections at the time of the adoption of the last Comprehensive Plan in 1994...." See Petition for Judicial Review at ¶ 11. In other words, Petitioners acknowledge both the significance and the rapidness of the changes that were relied upon by the County in determining to grant the requested amendment and not to wait for the completion of an update with an undetermined delivery date.

B. Dismissal of These Proceedings is Procedurally Required.

1. The Petitioners' Initial "Petition for Review" Is Jurisdictionally Defective.

The Petitioners' initial Petition for Review, which seeks review exclusively under I.C. §§ 67-6521, 67-6270 through 67-5277, and I.R.C.P. 84 (Petition for Judicial Review at p. 2), is jurisdictionally defective. As has been shown, it is beyond question that the Initial Order was purely and exclusively a legislative act not susceptible to judicial review under either the Idaho Administrative Procedure Act or the Local Land Use Planning Act (the very authority cited by Petitioners).

2. The Amended Petition Is An Improper Pleading and Should Be Stricken.

The Amended Petition, which Petitioners attempted to file on February 5, 2007, is a procedurally improper pleading and should be stricken. As with the initial Petition for Review, Petitioners predicate the same causes of action (as contained in the original Petition) upon Idaho Code § 67-6521, §§ 67-5270 through 67-5277, and I.R.C.P. 84. See Amended Petition for Judicial Review at ¶ 2. As to these claims (which essentially represent alternative efforts to assail a legislative act), they should be dismissed.

Further, Petitioners have failed to adhere to the requirements of the Idaho Rules of Civil Procedure (specifically Rule 15) by sua sponte and in the absence of a motion or order, filing the Amended Petition. Rule 15(a) requires a party to obtain leave of court to file an amended pleading if a pleading has been filed in response to the initiating pleading to which the amendment pertains. In this case, following Petitioners' filing of their Petition for Judicial Review, Intervenors Powderhorn and Heartland filed a responsive pleading. See Motion to Dismiss (filed January 29, 2007).[8] Pursuant to Rule 15(a), given the responsive pleading filed by Heartland and Powderhorn, Petitioners could not unilaterally and sua sponte amend their Petition for Judicial Review as they have attempted to do.

In an attempt to cure this patent defect, Petitioners now ask the Court, alternatively, for leave to file an amended Petition pursuant to Rule 15(a). However, at this juncture in the proceedings, said Motion should be denied for failure to comply with Rule 15(c).

Rule 15(c) precludes a party from amending a prior pleading to assert a claim that is now time-barred based upon the running of the applicable statute of limitations. In this particular instance, Petitioners seek leave pursuant to Rule 15(a) to amend their Petition, in the form filed or lodged, as the case may be, on February 5, 2007. To the extent that the Amended Petition seeks to raise any claim arising from or under the Final Order, entered by the County on November 16, 2006, it must fail. The statute of limitations applicable to a petition for review under the Local Land Use Planning Act and the Idaho Administrative Procedures Act is twenty-eight (28) days. See I.C. § 67-6521(1)(d). Since the Amended Petition was filed after the statute of limitations had run on the right to appeal

[8] I.R.C.P. 12(b) provides that a defense of lack of jurisdiction over the subject matter may be interposed as a defense, by motion, in response to a pleading.

from the Final Order, the granting of the Motion to Amend, insofar as it seeks to resuscitate an appeal applicable to the Final Order, must be denied.

The Petitioners are stuck with an appeal from an Order that no longer applies. They cannot now, after the period within which to appeal from the Final Order has run, seek to correct the error. It is too late. Their remedy would have been one of the following, none of which were accomplished: (1) the filing of an Amended Petition in this proceeding, within the twenty-eight (28) days following entry of the November 16, 2006 Order and prior to filing of any responsive pleading (such as a motion to dismiss); or (2) the filing of a motion to amend prior to the expiration of the twenty-eight (28) day limitations, after entry of the November 16, 2006 Order; or (3) the initiation of a separate judicial proceeding, also brought under the IDAPA in a timely manner under the November 16, 2006 Order, with a subsequent motion to consolidate that proceeding with this proceeding. None of the foregoing occurred. It is too late for them to occur now.

Petitioners may argue that the Amended Petition should relate back because Powderhorn or Heartland knew or should have known that the action had been timely initiated based upon the Initial Order and that but for a mistake on the part of Petitioners, the action should have included the Final Order. See Rule 15(c) (providing for a relation back if a party received notice of the institution of the action in a timely manner and the party will not be prejudiced in maintaining a defense on the merits). The problem with this argument, if advanced, is that Petitioners have, arguing that jurisdiction lies under the Local Land Use Planning Act, IDAPA, and Rule 84, wholly failed to comply with the requirements of Rule 84.

Specifically, Rule 84(b) requires that the party filing the petition for judicial review "concurrently serve copies of the notice of petition for judicial review upon the agency . . . and all

other parties to the proceeding before the agency . . . ." (Emphasis added). Proof of service on "all parties" shall be filed with the Court in the form required by Rule 5(f).

While Heartland, Powderhorn, and Magnuson have intervened notwithstanding the fact that they were never served by Petitioners, there is no evidence that the other parties to the requested amendment (Charles Blakley, Eastpoint Farms, Inc., or Bla Bar, Inc.) were ever served or that any proof of service was ever filed. The time for now serving those other parties has long-since passed.

Under Rule 4(a)(2), the time for effecting service is six (6) months after filing of the action. Accordingly, dismissal as to those parties, at this juncture, is effectively required. Hincks v. Neilson, 137 Idaho 610, 51 P.3d 424 (Ct. App. 2002). Further, given the jurisdictional time frame involved, and the intervening running of the statute of limitations (twenty-eight (28) days), as to those parties, the action cannot now be re-instituted by either an amendment in this proceeding or by the filing of a subsequent petition for review.

3. The Petitioners' Attempted Amended Petition Is Procedurally Improper, and Any Attempt to Now Advance Claims for Declaratory Relief Should Be Denied.

Through their attempted Amended Petition for Review, the Petitioners seek to include a claim for declaratory relief pursuant to the Uniform Declaratory Judgments Act, I.C. § 10-1201 *et seq.* The bases upon which to deny the Motion, insofar as it seeks to create an appellate right from a legislative act, are set forth above. Insofar as the declaratory judgment claim is concerned, the Motion should be denied on separate but equally significant grounds.

What the Petitioners have attempted to do here is to join a petition for appellate review with a claim for a declaratory relief. Different evidentiary standards and burdens of proof apply to the same. As the Court can well appreciate, the Petition for Judicial Review requires that this Court sit

in its appellate capacity. As such, its review is limited to the matters properly included in the record. Specific statutory and procedural authorities limit a party's ability to throw extraneous materials into the mix for consideration on appeal. See I.R.C.P. 84(l) and I.C. §§ 67-5276 and 67-5277.

In any and all events, any motion to present additional evidence must be timely made (within twenty-one (21) days of the filing of the transcript and record), and it must be supported by affidavit evidence as to why the materials were not included in the record in the first place. Neither requirement has been met in this case. Yet, Petitioners seek to throw materials into the mix, ostensibly in aid of their declaratory judgment claim, with the hope that said materials have some sub-silentio impact on the appellate side of the equation.

Given the divergent evidentiary standards, and the divergent standards for admissible proof, these Intervenors submit that it is procedurally improper, under the facts at bar, to allow for the joinder of a claim for declaratory relief with a claim for appellate review. That is not to say that the Petitioners cannot, should they so choose, advance a claim for declaratory relief in a separate proceeding. The Supreme Court has acknowledged the availability of such a remedy. See Burt v. City of Idaho Falls, 105 Idaho 65, 66, 665 P.2d 1075 (1983).

> While we hold that a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions . . . . In such instances, the decision will not be disturbed absent a clear showing that it is confiscatory, arbitrary, unreasonable or capricious.

Burt v. City of Idaho Falls, 105 Idaho at 66 (emphasis added) (citations omitted). By referring to such an avenue of relief as "collateral," the Supreme Court implicitly if not explicitly acknowledged the impropriety of including the two claims (for appellate review and declaratory relief) in the same proceeding. Should these Petitioners choose to initiate such a proceeding, they will be held to the

weighty evidentiary standards therein. Further, I.R.C.P. 84 will not apply and should the Petitioners seek a stay of any further proceedings, so as to cause further unnecessary expense and delay to the Intervenors, they will be subject to the requirements of I.R.C.P. 65, including the necessity of posting an undertaking.

C. There is No Factual or Legal Basis for Voiding the Board's Decision Based On the *Ex Parte* Contact Described by Petitioners.

1. Petitioners Have Cited No Legal Authority to Support the Proposition that A Legislative Act Can Be Voided Based on *Ex Parte* Contact.

All authorities cited by Petitioners in support of their *ex parte* argument are inapplicable and do not support the Petitioners' request for relief. The act undertaken by the Board was, for the reasons set forth above, clearly legislative. See Burt v. City of Idaho Falls, supra. The only "contrary" authority cited by Petitioners are I.C. § 67-5253 and Eacret v. Bonner County, 139 Idaho 780, 86 P.3d 494 (2004). Neither of the cited authorities supports the Petitioners' argument.

First, § 67-5253 applies to prohibit *ex parte* communications, except upon notice and opportunity for all parties to participate in the communication, to "a presiding officer serving in a contested case." The proceedings below were not a contested case. The Board is not a "hearing officer." The Board is an elected body. Further, a "contested case" is determined exclusively by entry of an order. I.C. § 67-5201(6). The proceedings below were neither a "case" nor were they determined by the issuance of an "order." They were determined by an elected body's legislative enactment of a resolution.

Second, the case of Eacret v. Bonner County, supra, does not apply. In Eacret, the Court heard an appeal from an individualized request for a variance submitted to the Bonner County Board

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2007 MAY 21 PM 4:09
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON,

Plaintiffs/Petitioners,

vs.

KOOTENAI COUNTY, a political subdivision of the State of Idaho acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants/Respondents,

NO. CV-06-8574

OBJECTION TO ALTERNATIVE MOTION FOR LEAVE TO AMEND PETITION FOR JUDICIAL REVIEW

and

POWDERHORN COMMUNITIES, LLC, HEARTLAND, LLC, COEUR D'ALENE LAND COMPANY, and H. F. MAGNUSON,

Intervenors/Respondents.

COME NOW Intervenors Coeur d'Alene Land Company and H. F. Magnuson, by and through their counsel of record, John F. Magnuson, and hereby object to Plaintiffs' "Alternative Motion for Leave to Amend," filed on or about April 9, 2007. The objection is based upon IRCP 15, IRCP 84(b) and I.C. §§ 67-5273 and 67-6521.Although motions for leave to amend are generally treated with liberality and granted under Rule 15, the Petitioners herein seek leave to appeal from a decision, under Rule 84(b) and I.C. §§ 67-5273 and 67-6521, notwithstanding the fact that the time for so doing has run. Moreover, Petitioners cannot avail themselves of IRCP 15 to revive a claim that is now time-barred or to add a declaratory relief claim which is outside of the appellate jurisdiction of this Court.[1] The Petitioners' proposed Alternative Amended Petition is untimely. The Petitioners' Alternative Motion for Leave to Amend, seeking to add an untimely appellate claim and a declaratory relief claim that cannot be combined with an appellate claim, should be denied.

[1]By way of example, and not by way of limitation, under Rule 41, no District Court Judge can be disqualified without cause while sitting in an appellate capacity. On the other hand, the limitation of Rule 41 does not apply to instances involving claims for declaratory relief. The incongruity of adding the two claims into one proceeding, with different evidentiary standards and different procedural rulings, is clear.

ORAL ARGUMENT IS REQUESTED.

Dated this 21st day of May, 2007.

JOHN F. MAGNUSON
Attorney for Intervenors Coeur d'Alene Land Co.
and Harry F. Magnuson

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served upon the following, **via facsimile and U.S. Mail, postage prepaid** this 21st day of May, 2007:

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit, unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON;

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KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R., "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants/Respondents,

and

POWDERHORN COMMUNITIES, LLC, and HEARTLAND, LLC, and COEUR D'ALENE LAND COMPANY and H. F. MAGNUSON,

Intervenors/Respondents.

Case No. CV-06-8574

PETITIONERS' BRIEF ON INTERVENORS MOTIONS TO DISMISS AND PETITIONERS MOTION FOR LEAVE TO AMEND FOR HEARING MAY 31, 2007

On February 7, 2007 Petitioners Neighbors for Responsible Growth et al (Hearing after "Neighbors") filed an Amended Petition for Judicial Review.

The amendment duplicated the first three causes of action, but deleted the request that Commissioner Katie Brodie be barred from participation upon remand. The voters on November 7, 2006 had taken care that future possibility.

The amendment added a fourth cause of action for declaratory judgment. Respondent Kootenai County in its brief asserts that declaratory judgment is not an allowable cause of action, but makes no objection to the timeliness nor to the filing without applying for leave of the Court.

Intervenors Powderhorn Communities, LLC and Heartland, LLC (hereinafter "Powderhorn") and Coeur d'Alene Land Company and H. F. Magnuson (hereinafter "Magnuson") filed objections in various forms to the filing of the amended complaint. In the response Neighbors filed an Alternative Motion for Leave to Amend.

At the procedural hearing on May 31st, all issues related to the procedure of filing the amended complaint and whether a declaratory judgment is an allowable pleading will be argued. This brief is directed to the procedural questions. Neighbors will not in this brief make any argument as to the merits of a declaratory

judgment action that subject being reserved for hearing on the merits on June 5, 2007.

These are the procedural issues:

1. Could Neighbors file the amended complaint without leave of the Court?

2. If not, should the Court grant Neighbors Motion for Leave to Amend?

3. May a cause of action for declaratory judgment be considered in this case?

A: <u>Motions are not Responsive Pleadings</u>

Rule 15 (a) I.R.Civ.P. provides that a party may amend the party's pleading once as a matter of course at any time before a responsive pleading is filed.

On March 2, 2007 Powderhorn filed an objection and Motion to Strike the Amended Petition for Review on the grounds that Powderhorn's Motion to Dismiss was a "responsive pleading" which would require leave of the Court of consent of the parties before filing.

Magnuson has joined in all of Powderhorn's objections and motions. In the Magnuson Response Brief dated May 4, 2007 the objection is supported as follows:

Rule 15 (a) requires a party to obtain leave of court to file an amended pleading if a pleading has been filed in response to the initiating pleading to which the amendment pertains. In this case, following Petitioners' filing of their Petition for Judicial Review, Intervenors Powderhorn and Heartland filed a responsive pleading. See Motion to Dismiss (filed January 29, 2007). Pursuant to Rule 15 (a), given the responsive pleading filed by Heartland and Powderhorn, Petitioners could not unilaterally and *sua sponte* amend their Petition for Judicial Review as they have attempted to do.

Responsive Brief of Intervenors Magnuson, p. 15.

Three days after this filing of the Motion to Strike by Powderhorn, Neighbors responded with the assertion that a motion to dismiss was not a responsive pleading buttressed by the pages from Vol. 6, Wright Miller- Kane, FEDERAL PRACTICE AND PROCEDURE, §§1482-1483, pp. 580-589.

As is discussed, elsewhere, the term "responsive pleading" as used in Rule 15 (a) must be interpreted in conjunction with the description of the pleadings allowed in federal court actions set forth in Rule 7 (a)
. . .

The language of Rule 7 (a) indicates that a motion is not a responsive pleading. This fact is important because certain motions may be made before interposing a responsive pleading.

Indeed, a motion involving any of the Rule 12 (b) defenses normally must be made before serving a responsive pleading, whenever such a pleading is permitted. Consequently, courts have held that the filing of a motion to dismiss will not prevent a party from subsequently amending without leave of court. Similarly, an amendment as of right may be made after a motion to strike is filed. Nor does a summary judgment motion made before responding have any effect on a party's

ability to amend under the first sentence of Rule 14 (a). Motions of this type are not "responsive pleadings" in any sense.

§1483, pp. 584 - 586.

More leisurely research has discovered solid confirmation from the Idaho Court of Appeals. In *Drennor v. Fisher,* 141 Idaho 942, 120 P.3d 1146 (App. 2005), the Idaho Court of Appeals reversed the district court denial of a motion to amend in a *habeas corpus* proceeding with these dispositive words:

> **Additionally, we note that Drennon was entitled to amend his petition even without leave of the district court. Under the provisions of I.R.C.P. 15 (a), "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . ." A motion to dismiss does not constitute a responsive pleading within the meaning of this rule. See I.R.C.P. 7 (a) and 15 (a); *O'Neil v. Schuckardt,* 116 Idaho 507, 509, 777 P.2d 729, 731 (1989); *Sinclair Marketing, Inc. v. Siepert,* 107 Idaho 1000, 1005 - 06, 695 P.2d 385, 390-391 (1985); *Bowden v. United States*, 176 F.3d 552, 555, (D.C. Cir. 1999).**

141 Idaho at 946.

Neighbors had a right to file the amended pleading adding the fourth cause of action without seeking leave of the court.

2. <u>Leave to Amend Must be Freely Given</u>

Not withstanding, Neighbors now provide to the Court the following excerpts from recent appellate decision that emphasizes the liberality with which the Idaho appellate courts have viewed amendments under Rule 15:

In considering whether to grant a motion for leave to amend, a trial court may consider whether the amended pleading sets out a valid claim, whether the opposing party would be prejudiced by any undue delay, or whether the opposing party has an available defense to the newly added claim. *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A.,* 119 Idaho 171, 175, 804 P.2d 900, 904 (1991) (citation omitted.) The court may not, however, weigh the sufficiency of the evidence related to the additional claim. *Becker,* 140 Idaho at 528, 96 P.3d at 628; *Thomas v. Med. Ctr. Physicians. P. A.,* 138 Idaho 200, 210, 61 P.3d 557, 567 (2002); *Carl H. Christensen Family Trust v. Christensen,* 133 Idaho 866, 8781, 993 P.2d 1197, 1202 (1999) (court may not consider the sufficiency of evidence in determining whether to allow a party to amend because that is more properly an issue for summary judgment state). Timeliness of a motion for leave to amend is not decisive, but it "is important in view of . . .factors such as undue delay, bad faith, and prejudice to the opponent." *Christensen,* 133 Idaho at 871, 993 P.2d at 1202 (citation omitted).

Spur Products Corporation v. Stoel Rivers, LLP, 142 Idaho 41, 44, 122 P.3d 300, _____ (2005).

This Court has held the following factors are controlling when a district court considers the timeliness of a motion for leave to amend a complaint; 'In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be freely given.

***Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 871, 99 3P.2d 1197, 1202 (1999) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 225 (1962) (internal citation omitted).**

Maroun v. Wyreless Systems, Inc., 141 Idaho 604, 612, 114 P.3d 974, ___ (2005).

Rule 15 (a) declares that leave to amend shall be freely given where justice so requires; this mandate is to be heeded. See generally, 3 Moore, Federal Practice (2nd ed. 1948), §§15.08, 15. 10. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rule require, "be freely given." *Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion; and inconsistent with the spirit of the Federal Rules."*

***Id.* (emphasis added) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 226 (1962).**

As quoted in *Drennon v. Fisher*, *supra*, 141 Idaho at 946.

3. Declaratory Judgment is Allowable in Zoning Cases

There is a direct relationship between the issue of whether the Fourth Cause of Action is allowable and whether the amendment to the Comprehensive Plan is legislative or quasi-judicial. As will be seen, the appropriate standard by which to judge this procedural question is the last sentence of Rule 8 (a) (1), I.R.Civ.P.:

Relief in the alternative or of several different types may be demanded.

The Idaho Supreme Court has thoroughly adopted alternative pleadings:

Modern pleading practice no longer prohibits parties from seeking alternative forms of relief even if the remedies sought are inconsistent. For example, in an action on contract a plaintiff may claim both damages and restitution, with the ultimate election to be made by the court. E.g., *E. H. Boly & Sons, Inc. v. Schneider,* 525 F.2d 20 (9th Cir. 1975).

"Whatever may be said for the common law doctrine of election of remedies before the advent of the Federal Rules of Civil Procedure, we are certain that there is no room for its application under applicable rules of procedure, according to which every pleading is a simple, concise statement of the operative facts on which relief can be granted on any sustainable legal theory "regardless of consistency, and whether based on legal or on equitable grounds or on both; Rule 8 (e) (1) (2) F.R.Civ.P., and, where the prayer or demand for relief is no part of the claim and the dimensions of the lawsuit are measured by what is proven." *Bernstein v. United States*, 256 F.2d 697, 706 (10th Cir. 1958), cert. dismissed, 358 U.S. 924, 79 S.Ct. 296, 3 L.Ed.2d 298 (1959).

M.K. Transport, Inc. v. Grover, 101 Idaho 345, 350, 612 P.2d 1192, ___ (1980).

Although not identified in the opinion as such, the complaint in *Gordon Paving Company v. Blaine County Board of County Commissioners*, 98 Idaho 730, 972 P.2d 164 (1977) was in the nature of a declaratory judgment. *Gordon Paving* applied for and obtained a conditional ordinance for its operation and when the time period was about to expire. ". . .instituted proceedings challenging the validity of the variance." 98 Idaho at 731. The "proceedings" were not an appeal since the county had not acted other than to grant the conditional variance.

The opinion commences with the customary deference to the expertise of municipal zoning authorities, but then concludes with a reading of the ordinance that determined that no variance was required. The opinion reversed the district court and rejected the expertise argument of the county attorney.

Next came *West Boise 87 v. L. & S Development Company,* 108 Idaho 449, 700 P.2d 71 (App. 1985) which commenced with a complaint by a citizens group for a writ of mandate and prohibition to withhold the developer's building permit and for declaratory relief. 108 Idaho at 450. The district court denied the mandate but also denied the developer's motion for summary judgment presumably directed at procedure. The Idaho Court of Appeals ultimately remanded the case back to the city council to exhaust administrative remedies, but rejected all of the developer's motions to dismiss this case altogether. The developer had a unsuccessfully agreed that the citizens' proper remedy was a petition for review not an independent complaint.

Palmer v. Board of County Commissioners of Blaine County, 117 Idaho 562, 790 P.2d 343 (1990) is a failure to exhaust administrative remedies case, but the concluding paragraph is a "both ways" approach. The Palmers started construction of a house close to the airport after receiving a building permit issued in April of 1985.

In April of 1986, the county issued a stop work order with a letter stating that the house was too close to the Picabo Airport runway. Meetings did not resolve the controversy and in September the Palmers sued the county seeking to nullify the stop work order.

The district court granted summary judgment to the county because the Palmers had failed to appeal under the Local Planning Act and the Administrative Procedure Act and therefore had not exhausted their administrative remedies.

The Idaho Supreme Court reversed on the grounds that the Palmers had not applied for a special use permit so the county had never acted. Therefor there was nothing to appeal from. The dismissal of the complaint was affirmed, but the Court explicitly directed that the Palmers could simultaneously pursue entirely separate causes of action:

> **The dismissal will be without prejudice to the filing of a petition for review by the district court or a complaint for damages, *or both*, after the Palmers have exhausted their administrative remedies.**

(Emphasis supplied). 117 Idaho at 565.

In *Jerome County v. Holloway,* 118 Idaho 681, 799 P.2d 969 (1990), the county filed a declaratory judgment complaint seeking determination as to whether the 1985 amendment to its zoning code placing limitations on the location of dairies was valid. The appellate decision was that the district court had jurisdiction

to issue its declaratory judgment upon the validity of the 1985 amendment but that the zoning authorities in Jerome County should decide under the Local Planning Act whether the dairy operators' request for a special use permit met the requirements of the pre-amended ordinance.

The *McCloskey v. Canyon County*, 123 Idaho 675, 851 P.2d 953 (1993), the Idaho Supreme Court in a surprisingly unanimous opinion explained or distinguished a number of earlier decisions and illuminated the appropriate rule for a declaratory judgment in a zoning case. In so doing, the highest court rejected both the theory adopted by the district court and the entirely different theory adopted by the Idaho Court of Appeals.

McCloskey wanted to build a service station in what he said was an industrial zone. Canyon County said the zone was rural residential. McCloskey filed a declaratory judgment action seeking a writ of mandate to compel issuance of a building permit. Canyon County filed a complaint for declaratory judgment the next day.

The district court held that McCloskey's land was "Rural Residential" and denied mandate. 123 Idaho at 659. The Idaho Court of Appeals held the complaints for declaratory judgment were not allowable under the Local Planning

Justice Bistline for the Idaho Supreme Court distinguished *Bone* and cited *Jerome County v. Holloway, supra,* and *Burt v. City of Idaho Falls,* 105 Idaho 65, 65 P.2d 1075 (1983):

> **In *Jerome*, this Court stated that "the district court had jurisdiction to issue its declaratory judgment regarding the validity of the 1985 amendment to the [Jerome County] zoning ordinance, " but appeals involving the issuance of a particular permit should be reviewed under the procedures established by the Local Planning Act. *Jerome*, 118 Idaho at 685, 799 P.23d at 973. *See Burt v. City of Idaho Falls,* 105 Idaho 65, 66 n. 2, 665 P.2d 1075m 1076 n. 2 (1983) ("While we hold that a legislative zoning decision is not subject to direct judicial review, it nonetheless may be scrutinized by means of collateral actions such as declaratory actions.")**

123 Idaho at 660.

The Court not only held that the trial court could consider declaratory judgments. The opinion concluded by reversing the declaratory judgment issued in favor of Canyon County and granting declaratory judgment to McCloskey. 123 Idaho at 664.

Neighbors made timely appeal from the decisions of the Kootenai County Board of Commissioners. This Court so held in its ruling from the bench on February 27, 2007. Neighbors may simultaneously plead a declaratory judgment.

4. Magnuson Objections Without Merit

The Magnuson Response of Brief dated May 9, 2007 makes certain objections which can be easily disposed of. On pages 15 and 16, Magnuson appears to assert two separate statute of limitations arguments. (1) That Neighbors did not make a timely appeal from the Amended Order by the Kootenai County Board of Commissioners entered November 16th amending the November 9th Order from which Petition for Review was filed and (2). That the Fourth Cause of Action under a declaratory judgment claim is barred by the 28 day appeal period in the Local Land Use Planning Act, Idaho Code §67-6521 (1) (d).

As to (1), that issue was the subject of Powderhorn's Motion to Dismiss argued at the February 27, 2007 hearing and rejected by this Court. See Excerpt (1) of Motion to Dismiss (Judge's Ruling) February 27, 2007 and Order Denying Motion to Dismiss entered by the Court in the week of March 5, 2007.

As to (2), the statute of limitations on a declaratory judgment action is four years in Idaho Code §5-224 "All Other Actions." None of the cases on declaratory judgment in zoning cases cited above imposed the 28 day petition for review standard. Declaratory judgment is a separate allowable action subject only to limitations applied to actions not named in Title 5, Chapter 2, Idaho Code.

The Magnuson brief cites Rule 84 (b), I.R.Civ.P. as requiring the appealing party to serve ". . .all other parties to the proceeding before the agency." The Magnuson interests have voluntarily intervened so any lack of service upon them is moot.

In fact, no one representing Magnuson or Coeur d'Alene Land Company was a party to any proceeding before the Planning Commission or the Board of Commissioners. See Transcripts, Case No. CP-080-05 Vol. 1. Neither did Charles Blakely or anyone representing East Point Farm, Inc. or Bla Bar, Inc. appear. In any event, Magnuson has no standing to assert a deficiency in service upon any other party to the proceeding.

Powderhorn and Heartland intervened so service is moot as to them. In the Agency Record Volume 1 of 6 from East Point Farm, Inc. (pp. 61 - 65), Bla Bar, Inc. and Charles Blakely (pp. 30 - 31) and Magnuson and Coeur d'Alene Land Company (pp. 32 - 33) are Letters of Support and/or agency authorizations giving Heartland, LLC and Powderhorn Communities, LLC full authority to act on behalf of these entities. Every landowner is properly represented at this time in this case.

D. Declaratory Judgment Proper on Legislative Decisions

The alternative causes action are tailored to meet the alternative contentions of the intervenors. While arguing on the merits to sustain the actions of the county commissioners under the Local Planning Act, intervenors also urge this Court to

dismiss the appeal because it was a legislative rather than a quasi judicial administrative act.[1]

If the actions of the Board of Commissioners to change the zone was legislative, then such actions are reviewable on a declaratory judgment cause of action. That is the solid holding of the Idaho Supreme Court beginning with *Burt v. City of Idaho Falls,* and continuing through *McCloskey v. Canyon County.* Ultimately *McCloskey* prevailed in his contention that the down zoning ordinance was voidable by declaratory judgment.

SUMMARY

Neighbors were not required to seek leave of the court to file their amended petition for review. Under Rule 15 (a) I.R.Civ.P., the motion for leave to amend would have been freely granted.

The Idaho appellate courts have supported alternative pleading and have allowed declaratory judgment causes of action in zoning cases with or without petitions for judicial review.

Declaratory judgment is the appropriate challenge to a legislative action by the board of commissioners.

---

[1]It is worthy of note that county attorney John Cafferty in his brief does not contend as did non-lawyer Mark Mussman that the zone change was legislative.

All of the motions of intervenors should be denied.

Respectfully submitted, this 24th day of May, 2007.

Scott W. Reed
Attorney for Petitioners/Plaintiffs

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing is sent by first class mail, postage prepaid, this 24th day of May, 2007 to:

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit, unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON;

Plaintiffs/Petitioners,

v.

KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R., "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants/Respondents,

and

POWDERHORN COMMUNITIES, LLC, and HEARTLAND, LLC, and COEUR D'ALENE LAND COMPANY and H. F. MAGNUSON,

Intervenors/Respondents.

Case No. CV-06-8574

M E M O R A N D U M O F PLAINTIFFS/PETITIONERS IN OPPOSITION TO INTERVENORS MOTION TO STRIKE FOR HEARING MAY 31, 2007

Intervenors have moved to strike Appendices A, B and C attached to Petitioners' Opening Brief as outside the record without a proper move to supplement under Rule 84, I.R.Civ.P. This is the first sentence in Rule 84 (l):

> **Any party desiring to augment the transcript or record with additional materials *presented to the agency* may move the district court within twenty-one (21) days of the filing of the settled transcript and record in the same manner and pursuant to the same procedure for augmentation of the record in appeals to the Supreme Court.** (Emphasis supplied).

The opposition to Appendix "A" is puzzling. Appendix A is selected excerpts from the conflicting Findings of Fact and Comprehensive Plan analysis taken from the November 9, 2006 Order of Decision (Agency Record, Vol. 3, pp. 601 -613) and the November 16, 2006 Amended Order of Decision. Agency Record, Vol. 3, pp. 590 - 600. *Exhibit A is the record.*

Appendix B is an official federal government publication of the United States Department of Agriculture on the Conservation Reserve Program currently in effect. The Court may take judicial notice of a non disputed government publication. In *Trautman v. Hill,* 116 Idaho 337, 775 P.2d 651 (App. 1989), the Idaho Supreme Court upheld the use of the use of the Consumers Price Index (CPI) published by the U.S. Bureau of Labor Statistics:

> **This Court may take judicial notice of adjudicative facts, those not subject to reasonable dispute in that they are either generally known within the territorial jurisdiction of the trial court or are capable of**

accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. I.R.E. 201. This notice may be taken at any stage in the proceeding, at the trial or appellate level and extends to official reports of the federal government, including those we have referred to published by the Bureau of Labor Statistics, United States Department of Labor. ***See State ex rel. Helm v. Kramer,*** **82 Wash.2d 307, 510 P.2d 1110 (1973);** ***Washakie County School Dist. No. 1 v. Herschler,*** **606 P.2d 310 (Wyo. 1980).**

116 Idaho at 340.

Appendix C is a certificate on documents made by Kootenai County Forester/Agricultural Appraiser Gordon Harnasch establishing that most of the 3,000 acres asserted to be subject to zone change because they were no longer timber productive were at the time or up to the year before in a timber tax exemption based on certification by the owners with adequate support by qualified timber experts as suitable for growing timber. Rule 84 (l) requires a motion ". . . to augment the transcript or record with additional materials presented to the agency. . ." These timber exemption records were never presented to the agency so no motion to augment is required.

Appendix C contains duly authenticated public records obtained under Idaho Code §9-338. These are admissible under Rule 1005, I.R.E. Further Appendix C coming from an employee of respondent Kootenai County qualifies as an exception to the hearsay rule admissible under Rule 801 (2) (D), I.R.E.

Appendices B and C are not testimonial, but records of a government agency without challenge to authenticity. Neither was presented to the agency, the Kootenai County Board of Commissioners. No motion was required to file Appendices B and C.

Paragraph 2 of Intervenors' Motion to Strike reads:

> **2. Appendix A to Brief of Petitioners in Opposition to Intervenors' Motion to Dismiss for Lack of Jurisdiction as it is outside the record.**

Undersigned counsel has not located any Appendix A to that brief and there is no reference in that brief to Appendix A. The original brief of petitioners in opposition to intervenors' motion as filed with the clerk does not have an Appendix A. Perhaps simply filing the Motion to Strike caused Appendix A to be vaporized.

The third object of the Motion to Strike are Appendices A and B to the Petitioners' Amended Petition for Judicial Review. Appendix A is a copy of the December 16, 2005 letter of applicants Powderhorn Communities, LLC and Heartland, LLC from JUB Engineers to Rand Wichman, Planning Director.

This letter is in the record. Agency Record Case No. CP-080-05, Vol. 1 pp. 57 - 58. Again, this *Exhibit A is the record.*

Intervenors do not challenge the authenticity of the letter nor could they since they originated it. The letter is clearly a public record on file under Idaho Code §9-337 (12) admissible under Rule 1005, I.R.E.

Further this letter is an admission by a party opponent, a statement by JUB, an agent of Powderhorn Communities, LLC concerning a matter within the scope of employment of the agent under Rule 801 (2) (D). It is relevant to the allegations in the amended petition of conflict of interest concerning respondents Kootenai County and Rand Wichman.

Rule 84 (1) I.R.Civ.P. cited by intervenors relates only to settlement or preparation of the transcript and of the written record. Since the appendices which intervenor seeks to strike were not "presented to the agency" the settlement procedures in Rule 84 (j) have no application.

Appendix B is a reproduction of a portion of the agency transcript filed in *Gilbert v. Kootenai County,* No. CV-05-4653

In that case, an appeal from the county commissioners, the transcript was prepared by Kootenai County in accordance with Rule 84, I.R.Civ.P. The transcript was not presented to the agency in this case so augmentation was not necessary.

It is an official transcript and public record as allowed by Rule 1005 (b) I.R.E.

Respectfully submitted, this 24th day of May, 2007.

Scott W. Reed
Attorney for Petitioners/Plaintiffs

CLERK'S CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing is sent by first class mail, postage prepaid, this 24th day of May, 2007 to:

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STATE OF IDAHO } SS
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Attorneys for Intervenors Powderhorn Communities LLC and Heartland LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unicorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unicorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON,

Plaintiffs,

v.

KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants,

and

POWDERHORN COMMUNITIES LLC; HEARTLAND LLC; COEUR D'ALENE LAND COMPANY; and H.F. MAGNUSON,

Intervenors/Respondents.

NO. CV-06-8574

POWDERHORN COMMUNITIES LLC AND HEARTLAND LLC'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE AMENDED PETITION FOR JUDICIAL REVIEW

INTERVENORS POWDERHORN COMMUNITIES LLC and HEARTLAND LLC submit the following Reply Memorandum in support of their Motion for an Order dismissing the Amended Petition for Judicial Review. In their May 24, 2007 Response Brief, Petitioners argue at length why their various proposed Amended Petitions should not be dismissed. Petitioners contend that under Rule 15(a) leave of Court was not required for them to appeal of another Decision of the Commissioners and to add a declaratory relief claim. Petitioners next contend that if leave of Court is required under Rule 15(a), then such leave of Court should be freely given. Petitioners next contend Declaratory Judgments are allowed in zoning cases (which may be true, but as this case is not a zoning case, it is a Comprehensive Plan appeal, Petitioners' argument is irrelevant. Petitioners have successfully stayed any and all zoning actions before the public hearings could get started.) Petitioners lastly contend Declaratory Judgments are proper on legislative decisions (which again may be true, but Petitioners' Petition for Judicial Review claims to rely upon a quasi-judicial decision, not a legislative action, as its necessary basis for appellate jurisdiction before this Court.)

Petitioners' Proposed Amended Petition for Judicial Review Fails to Set Out a Valid Claim and Therefore Should be Denied.

Despite presenting the above smattering of arguments, Petitioners completely failed to address the real death knell to their case, that is the untimeliness of the Amended Petition and the proposed Amended Petition. The fundamental basis for dismissal of the Amended Petition is its lack of timeliness under Idaho Code 67-6521(1)(d) and Rule 84. In considering whether

to grant a motion for leave to amend, a trial court may consider whether the amended pleading sets out a valid claim, whether the opposing party would be prejudiced by any undue delay, or whether the opposing party has an available defense to the newly added claim.. *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank,* 119 Idaho 171, 175, 804 P.2d 900, 904 (1991).

Petitioners' Amended Petition does not set out a valid claim because it is time barred. Petitioners failed to timely appeal the November 16, 2006 decision within the 28 days required under Idaho Code 67-6521 and Rule 84(b). Thus, as the claim is untimely and beyond the 28 day statute of limitations, it is not a valid claim and should not be added via this amendment.

Additionally, Intervenors as the opposing parties, have an available defense to the proposed newly added claim, i.e. the claim is barred by the 28 day statute of limitations for Petitions for Judicial Review. I.C. 67-6521 and Rule 84. On November 15, 2006, Petitioners filed this Petition for Judicial Review as a quasi judicial land use appeal. In choosing this method of appeal, Petitioners selected the rules which would control judicial review herein. Those rules, Idaho Code 67-6521 and Rule 84, require a filing within 28 days of a final decision. Contrary to the rules selected by Petitioners, the November 16, 2006 decision was not appealed until Petitioners sought amendment nearly three months later, on February 5, 2007. Because the proposed Amendment contains a new Order of Decision and a newly added claim to which the parties have a valid defense, the Amendment should be denied.

Additionally, the requested Amendment should be denied as Respondent and Intervenors will be prejudiced by the undue delay. The briefing in this matter has concluded.

Final oral argument on the merits is set to occur next week. Substantial prejudice will occur if now, after the fact, the parties learn that a declaratory relief claim is going to be added as part of the Petition for Review. Declaratory relief actions provide for discovery, depositions, evidence outside the record on appeal, and an entirely different statutory analysis from Petitions for Judicial Review of land use decisions. Yet, the present case is nearly concluded without any of the normal declaratory relief judicial process having occurred. Thus, Petitioners' amendment seeking to add a declaratory relief claim at this late date should be denied given the undue delay in seeking such amendment and the substantial prejudice to the parties.

Petitioners Misstate and Misconstrue the Court's February 27, 2007 Ruling. This Court Has Not Ruled the Amended Petition Was Timely Filed.

In their Brief at pages 12 and 13, Petitioners claim the Court already ruled (favorably for Petitioners) on the timeliness of their Amended Petition. Petitioners claim that during the February 27, 2007 hearing, the Court rejected the argument that Petitioners failed to timely appeal the November 16, 2007 Amended Order from the Kootenai County Commissioners. *See* Petitioners Brief, dated May 24, 2007, at p. 13. Petitioners claim both the November 7 and November 16 decisions from the Commissioners were timely appealed based upon the Court's ruling, stating, "Neighbors made timely appeal from the decisions of the Kootenai County Board of Commissioners. This Court so held in its ruling from the bench of February 27, 2007. Neighbors may simultaneously plead a declaratory judgment." *See* Petitioners' Brief, dated May 24, 2007, at p. 12. (emphasis added.)

Whether these misstatements by Petitioners are intentional or just honest mistakes is unclear. What is clear from the record is that the Court did not rule on the timeliness of the February 2007 Amended Petition's attempt to appeal the November 15, 2006 Amended Order. Despite Powderhorn's repeated attempts to get this entire case dismissed, the Court limited its February ruling to only the November 15, 2006 Petition dealing with the November 7, 2006 Decision. The Court repeatedly, expressly, and clearly refused to rule on Petitioners' Amended Petition, the November 16, 2006 Amended Decision, or the Declaratory Relief claim. The Court ruled:

> I don't view – what we have here before the Court is a motion to dismiss the **November 9 Petition for review**. So, whether the declaratory judgment cause of action added into the amended petition somehow would survive or something like that, just really is not before the Court. We don't have a motion to dismiss the declaratory judgment action, cause of action, in the amended petition.

See Court Transcript, 2/27/07, p. 4, lns. 4-11 (emphasis added).

> And so the original petition for appeal would not be dismissed, and the motion to dismiss that original petition is denied.
>
> **Now, I'm not, on the amended petition,** I didn't, as I stated, I didn't really have--I didn't—I'm not - - there may be an argument that the amended petition which I'm just not - - and as far as I am concerned, that's the only thing the Court was really prepared to rule on today. **There may be some grounds for - - I haven't - - attacking the amended petition. I don't know. And so but I'm not ruling on whether the amended petition was necessary or timely or anything.** All I am ruling on right now is the motion to dismiss the original petition on the grounds that it is either moot, that it is moot, and then there was nothing filed...

See Court Transcript, 2/27/07, p. 9, lns. 14-25 (emphasis added).

> If there is some other - - for example, like the declaratory judgment action, just exactly like was argued here, it may be that the declaratory judgment - - adding a declaratory judgment claim for relief into an amended petition should be subject to a motion to dismiss. I'm not ruling on that. I don't consider it before

the Court at this time. **If a motion to dismiss the amended petition is made on some grounds or not, nothing I am saying here is trying to rule on that. I'm not ruling on whether the amended petition could be subject to a motion to dismiss on some grounds.**

See Court Transcript, 2/27/07, p. 10, lns. 3-13 (emphasis added).

Putting Petitioners misstatements aside, it is clear the Court has not deemed the Amended Petition timely and the Court has not ruled whether any appeal of the November 16, 2006 Amended Order or the proposed declaratory relief claim can proceed. These issues will be addressed before the Court on May 31, 2007 and the lack of timely filing should preclude the Amendment and consideration of the November 16, 2006 Order or the declaratory relief claim.

This is Not a Zoning Case. It is a Comprehensive Plan Case. The Two are Substantively and Legally Distinct.

Throughout their materials, Petitioners repeatedly and incorrectly call this a "zoning case" and cite to "zoning decisions." *See* Petitioners Brief dated May 24, 2007, pp. 4, 9, 11, 12, 13, and 15. The most blatant and egregious misrepresentation of this case occurs on page 15 where Petitioners state, "If the actions of the Board of Commissioners to change the *zone* was legislative, then such actions are reviewable on a declaratory judgment cause of action." *Id.* at p. 15. The obvious error with Petitioners statement and their entire brief is the fact that no change in the zone occurred. The action of the Board was to change the Comprehensive Plan with an amendment to the Future Land Use Map designation. No zoning change has been allowed. Petitioners themselves are responsible for staying action on any zoning cases, including the public hearings on five other zone change applications.

Zoning is statutorily governed by Idaho Code § 67-6511. As stated therein, zoning cases address the following specific standards:

> Idaho Code § 67-6511. Zoning ordinance
>
> The zoning districts shall be in accordance with the policies set forth in the adopted comprehensive plan.
>
> Within a zoning district, the governing board shall where appropriate, establish standards to regulate and restrict the height, number of stories, size, construction, reconstruction, alteration, repair or use of buildings and structures; percentage of lot occupancy, size of courts, yards, and open spaces; density of population; and the location and use of buildings and structures. All standards shall be uniform for each class or kind of buildings throughout each district, but the standards in one (1) district may differ from those in another district.

I.C. § 67-6511.

Kootenai County's zoning ordinance is set out at Ordinance No. 393 and regulates among other things:

> 1. The height, number of stories, size, construction, reconstruction, alteration, repair or location of structures;
>
> 2. Percentage of coverage, size of required yards, and density of residential dwellings;
>
> 3. The use of structures and property.

Koot. Co. Zoning Ordinance No. 393.

Unlike zoning cases which deal with specific development details as listed above, Comprehensive Plan amendments take a much broader, general view of land use planning.

> Idaho Code § 67-6508. Planning duties
>
> It shall be the duty of the planning or planning and zoning commission to conduct a comprehensive planning process designed to prepare, implement, and review and update a **comprehensive plan,** hereafter referred to as the plan. The

plan shall include all land within the jurisdiction of the governing board. The plan shall consider previous and existing conditions, trends, desirable goals and objectives, or desirable future situations for each planning component. The plan with maps, charts, and reports shall be based on the following components as they may apply to land use regulations and actions unless the plan specifies reasons why a particular component is unneeded.

Idaho Code § 67-6508.

Within the general categories of a Comprehensive Plan are the following:

(a) Property Rights

(b) Population

(c) School Facilities and Transportation

(d) Economic Development

(e) Land Use – An analysis of natural land types, existing land covers and uses, and the intrinsic suitability of lands for uses such as agriculture, forestry, mineral exploration and extraction, preservation, recreation, housing, commerce, industry, and public facilities. A map shall be prepared indicating suitable projected land uses for the jurisdiction.

(f) Natural Resource

(g) Hazardous Areas

(h) Public Services, Facilities, and Utilities

(i) Transportation

(j) Recreation

(k) Special Areas or Sites

(l) Housing

(m) Community Design

(n) Implementation -- An analysis to determine actions, programs, budgets, ordinances, or other methods including scheduling of public expenditures to provide for the timely execution of the various components of the plan.

Nothing herein shall preclude the consideration of additional planning components or subject matter.

I.C. 67-6508.

Kootenai County's Comprehensive Plan amendment standards are set out at Resolution No. 95-03 and provide for amendment of the Comprehensive Plan "...to correct errors in the original plan or to recognize substantial changes in the actual conditions in the area.." Koot. Co. Res. No. 95-03.

Thus, Petitioners' claim that this is a "zoning case" is completely erroneous. This is a Comprehensive Plan case; specifically, a Comprehensive Plan future land use map designation amendment. Substantively and legally, zoning cases and comprehensive plan cases are distinct to the point of being mutually exclusive. Petitioners' attempt to blend the two issues should be rejected. Distinct legal and factual standards apply and the land use map amendment granted to Powderhorn et. al. was proper based upon Idaho Code 67-6508 and Kootenai County Resolution No. 95-03. The zoning ordinance legal standards of Idaho Code 67-6511, Kootenai Ordinance 393, and case law governing zoning decisions, have no relevance or application here.

Not Every Landowner is Represented In this Case.

Continuing their misrepresentations to the Court, Petitioners state at page 14 of their Brief, "Every landowner is properly represented at this time in this case." Petitioners apparently present this false statement in an attempt to garner support for their declaratory relief action by claiming all the necessary parties are present in this action. However, only four entities, Powderhorn Communities LLC, Heartland LLC, Coeur d'Alene Land Company, and H.F. Magnuson are parties represented in this action. Not all of these entities are landowners. During the Motion to Intervene, the Court expressly and forcefully warned against other landowners attempting to intervene, and none have. However, the fact remains that the Comprehensive Plan decision appealed herein covered over 3,000 acres of land, owned by some fifty different entities. R. Vol. 2, p. 310, R. Vol. 2, pp. 299-309, and R. Vol. 1, p. 57. These fifty landowners are not represented in this action and Petitioners are aware of this fact. If Petitioners seek to litigate a declaratory relief action regarding these 3,000 acres and the fifty different owners, then the landowners subject to the declaratory relief are entitled to participate in that action.

Rule 84(b) requires actual service upon "all other parties to the proceeding before the agency." Petitioners of course failed to comply with such service. In an attempt to cover up or minimize their failure to serve "all other parties to the proceeding before the agency,' Petitioners give inaccurate information to the Court, claiming several landowners did not appear before the agency. Petitioners inaccurately state to the Court, "Neither did Charles Blakley or anyone representing East Point Farms, Inc. or Bla Bar, Inc. appear." Not only did these entities appear on the record before the agency, but also their comments were quoted to

the Court and Petitioners' attorney in Powderhorn's opposition brief filed April 27, 2007. *See* Intervenors Brief, dated 4/27/07, p. 32-33. The Record on Appeal herein shows Mr. Blakley filed his comments on behalf of Bla Bar, Inc. on September 20, 2006. R. Vol. 2, p. 395. Mr. Blakley was also present before the Commissioners and referred to during the curative hearing of Oct 4, 2006. Tr. Vol. 1, p. 223. East Point Farms' representative Stan Parks appeared in the record on September 21, 2006. R. Vol. 2, p. 388. Bla Bar, Inc. and East Point Farms, Inc. also appeared at the proceedings before the agency through its representatives Steve Walker and Brad Marshall. Although they own land within the Comprehensive Plan decision and appeared on the record before the agency, none of these landowning parties to the proceeding (Bla Bar, Inc., Charles Blakley, or East Point Farms, Inc.) were served by Petitioners, nor are they represented herein.

Petitioners are not allowed to amend the Petition for Judicial Review under Rule 15(a).

Part of the overriding and ongoing problem with Petitioners' case is due to their incorrect attempts to use appellate procedures when it suits them, and then also trying to use trial court procedures when it suits them. The two sets of Rules do not always fit, as is the case with Petitioners' recent attempt to amend this defective land use appeal. This action is an appeal under Rule 84 and Idaho Code 67-6521(1)(d) (the Local Land Use Planning Act); specifically Petitioners have asserted an appeal of an alleged land use action and filed a Petition for Judicial Review. There are no provisions under Rule 84 for amending this appeal or any Petition for Judicial Review. Although Petitioners cite and rely upon Rule 15(a) as support for

their purported Amended Petition, Rule 15(a) is limited to amendments of "pleadings." Idaho Civil Procedure Rule 7(a) describes and limits "pleadings" to a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, a third-party answer and a reply to an answer or a third-party answer. *O'Neil v. Schuckardt,* 116 Idaho 507, 509, 777 P.2d 729, 732 (1989). Petitions for Judicial Review are not included in the list of "pleadings" under Rule 7(a) and thus are not "pleadings" subject to amendment under the authority of Rule 15(a). Instead, Rule 84(a)(1) limits and controls the procedures in this action. The Rule for Petitions for Judicial Review states:

> **Rule 84(a). Judicial review of state agency and local government actions.**
> **(1) Scope of Rule 84.**
>
> The procedures and standards of review applicable to judicial review of state agency and local government actions shall be as provided by statute. When judicial review of an action of a state agency or local government is expressly provided by statute but no stated procedure or standard of review is provided in that statute, then Rule 84 provides the procedure for the district Court's judicial review. Actions of state agencies or officers or actions of a local government, its officers, or its units are not subject to judicial review unless expressly authorized by statute.

I.R.C.P. 84(a)(1).

The definitions of Rule 84 further evidence this judicial review appeal is unlike typical trial court civil proceedings.

> **(2) Definitions.**
> The term "action," "agency," "judicial review," "petitioner" and "respondent" have the following meaning in Rule 84:
> **(A)** "Action" means any rule, order, ordinance or other decision or lack of decision of an agency made reviewable by statute.
> **(B)** "Agency" means any non judicial board, commission, department, or officer for which statute provides for the district court's judicial review of the agency's

action.

(C) "Judicial review" means the district court's review pursuant to statute of actions of agencies, whether the statutory term for review is appeal or judicial review or some other term, and the term judicial review includes other term, and the term judicial review includes other terms like appeal.

(D) "Petitioner" means the person seeking judicial review and includes other terms like appellant.

(E) "Respondent" means any person responding to the petitioner's request for judicial review of the agency's actions before the district court, including the agency itself.

I.R.C.P. 84(a)(2).

Thus, because this appeal is governed by Rule 84 and the statutory provisions set out in the LLUPA, Idaho Code 67-6501 et. seq., Petitioners reliance on Rule 15 and other trial procedures is misplaced. The governing 28 day filing deadlines of Rule 84 and Idaho Code 67-6521 have not been met and the Amended Petition should be denied. No provisions exist under Rule 84 or Idaho Code 67-6521 for extending the 28 day deadline.

DATED this 30th day of May, 2007.

LUKINS & ANNIS, P.S.

By _____
MISCHELLE R. FULGHAM
ISB #4623
PETER J. SMITH IV
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Attorneys for Intervenors Powderhorn Communities LLC and Heartland LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of May, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit, unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON;

Plaintiffs/Petitioners,

v.

KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R., "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants/Respondents,

and

POWDERHORN COMMUNITIES, LLC, and HEARTLAND, LLC, and COEUR D'ALENE LAND COMPANY and H. F. MAGNUSON,

Intervenors/Respondents.

Case No. CV-06-8574

PETITIONERS' REPLY BRIEF

In the initial hearing of Intervenors' Motion to Dismiss, this Court stated that it was premature to decide whether the proceeding before the planning commission and then the board of county commissioners to amend the Comprehensive Plan in changing the zone from Agricultural and Timber to Rural was quasi-judicial or legislative.

A. POWDERHORN AMENDMENT NOT GENERAL RULE OR POLICY

Plaintiffs/Petitioners Neighbors for Responsible Growth, et al (Neighbors) contend that the proceeding as conducted and legally based on cited appellate cases in Idaho and from other jurisdictions with comparable zoning laws was quasi-judicial, not legislative.

Alternatively, if legislative, the decision of the commissioners is subject to review or in the amended petition under the declaratory judgment Fourth Cause of Action.

Defendant Kootenai County, while making objection to the amended petition Fourth Cause of Action, does not assert that the proceeding was legislative.

Intervenors Heartland, LLC and Powderhorn Communities, LLC (Powderhorn) and Coeur d'Alene Land Company and H.F. Magnuson (Magnuson) argue that the proceeding must be construed as legislative.

1. **No Notice to Affected Owners of 1,338 Acres**

For reasons set forth accurately in Powderhorn Intervenors' Brief in Opposition to Petition for Judicial Review, the decision of the board of county commissioners to amend the Comprehensive Plan must be nullified, not just remanded if this Court determines that the proceeding was quasi-judicial, not legislative. This is from Powderhorn Intervenors' Brief in Opposition to Petition for Judicial Review:

> **The Powderhorn Amendment sought three general Comp. Plan revisions, all based upon substantial changes. First, the Amendment sought to update the County's Comprehensive Plan Future Land Use Map designation from an Agricultural designation to a Rural Residential designation. R. Vol. 1, p. 57. . . .Next, the Powderhorn Application sought to change a Timber category to a Rural Residential category because the land no longer sustained any viable timber operations. R. Vol. 1, p. 57; R. Vol. 2, pp. 248-255. Lastly, the Powderhorn Application sought to include an overlay designation of Rural Residential in the Federal Lands category. R. Vol. 1, p. 57. The Comp. Plan Rural Residential overlay category would apply to the Federal Lands designation in the event ownership of these lands later became private. R. Vol. 1, p. 54.**
>
> Brief, p. 4.

If the Powderhorn amendment is legislative, then affected property owners within the zone change need not be notified, but if quasi-judicial, these non-participating owners must be notified.

The Powderhorn Application was stated to encompass 2,946 acres, rounded off to 3,000 acres. Vol. 1, p. 57.[1] The total acreage of the Powderhorn entities, Blakely, Bla Bar, Inc., East Farms, Inc. and Magnuson adds up to 1,662 acres.[2]

The non-participating private properties are shown in white and the United States at Bell Bay yellow while the applicant and supporting ownerships are black or grey. See, e.g., Vol. 1, p. 67 and 65. Subtracting the 1,662 Powderhorn controlled acres from the rounded off 3,000 acres leaves owners of 1,338 acres of land within the zone change who did not receive notice nor did they consent to the amendment.

2. County Attorney Treated Proceedings as Quasi-Judicial

In Powderhorn Intervenors' Opposition Brief, footnote 4 on page 4 states as follows:

---

[1]Letter JUB to Rand Wichman, December 16, 2006.

Agricultural to Rural Residential	2,725 acres
Timber to Rural Residential	40 acres
Federal to Rural Residential	181 acres
	2,946 acres

[2]From Vol. 1

p. 30 Bla Bar, Inc. and Blakeley	219 acres
p. 32 Magnuson and Coeur d'Alene Land	470 acres
p. 64 East Point Farms, Inc.	533 acres
p. 66 Powderhorn Communities	440 acres
	1,662 acres

County Attorney John Cafferty likewise stated that Comp. Plan amendments were "legislative" matters. Tr. Vol. 1, p. 114.

Intervenors provided a more accurate summary at page 24 of their brief, but the inference remains that the county attorney was applying "legislative" to the Powderhorn proceedings. The cited statements was made on the van on the trip to visit the site on September 25, 2006. Tr., pp. 107 - 201. It is totally out of context. The previous and following discussions were about the "Comprehensive Plan Meetings in the Box" which were being conducted by designated professionals to assist the planning commission and the board of county commissioners to develop a new Comprehensive Plan for the entire county which is indeed a legislative matter.

The discussion starts on Tr. p. 111, about a planning and zoning hearing at Mica Grange continuing to Tr., p. 114, L. 2 - 6. The discussion goes on to consideration of changes in policy. The complete context was not Powderhorn's application but this:

BY COMMISSIONER BRODIE: Oh, Oh what a gorgeous morning. So anyway, the answer of, can the Commissioners attend any of the Meetings in a Box, the answer at this time is yes.

BY MARK MUSSMAN: Yeah.

BY JOHN CAFFERTY: It is a legislative issue.

Tr., Vol. 1, p. 114, L. 9 - 14.

County Attorney Cafferty at all times treated the application of Powderhorn as a quasi-judicial action. His instructions to the county commissioners prior to and at the site visit were in the context of a quasi-judicial hearing.

If the county attorney had viewed the proceeding as legislative, there would have been no reason to prohibit ex-parte communication with the developer and its representatives or anyone on the other side. Following up on the site visit, there could not have been any reason to schedule and conduct a further post-site hearing if the proceeding were legislative.

In the Kootenai County Respondent's Brief under "DISCUSSION A. DUE PROCESS." (p. 4), the argument and the cases cited use the words "due process" eleven times on three pages. (Pages 6 - 8) Due process has meaning in a quasi-judicial proceeding. Due process has no application to a legislative determination. See dissent of Justice Bakes joined by Justice Bistline in *Burt v. City of Idaho Falls,* 105 Idaho 65, 68-71, 665 P.2d 1075, _____ (1983) arguing that the case was quasi-judicial requiring due process.

3. Powderhorn-Comp Amendment Tiny Part of County

Based on measuring the Metsker Map of Kootenai County, the exterior county dimensions are approximately 28 miles east-west by 33 miles north-south which comes to 924 square miles. At 640 acres per square mile, the total county

acreage is 591,360 acres which is the area that will be subject to the new Comprehensive Plan as it is to the existing Comprehensive Plan. The 3,000 acres which Powderhorn seeks to change totals only an infinitesimal .005%, (one-half of one percent,) of the total Kootenai County acreage.

Powderhorn Intervenors cite *Holbrook v. Clark County*, 112 Wn. App. 354, 365, 49 P.3d 142, _____ (2002) with a quote in their brief at page 44.[3] Immediately following the last sentence of that quotation is this:

> **As Holbrook points out, there are circumstances in which even legislative decisions can give rise to individual constitutional due process protections. *When one person, or relative few people, are exceptionally affected by a decision on individual grounds, then such persons may be entitled to basic due process rights, including individual notice.* For example, in *Harris*, the court held that a property owner was entitled to individual notice of a hearing on the adoption of a comprehensive plan amendment because, during the amendment process, the owner's land had been specifically targeted for a zoning change. 904 F.2d at 502. The Sixth Circuit held to similar effect in *Nasierowski bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 895-96 (6th Cir. 1991).**
> (Emphasis supplied).
>
> 49 P.3d at 149.

As noted in the Brief of Petitioners in Opposition to Intervenors Motion to Dismiss for Lack of Jurisdiction (p. 8), the Washington Legislature by statute specifically excluded from "quasi-judicial" review in RCW §42.36.010 all ". . .

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[3]The *Holbrook* case was cited in Petitioners' Opening Brief, pp. 8 - 9.

legislative actions adopting, amending or revising comprehensive, community or neighborhood plans." *Jones v. King County*, 74 Wash. App. 467,_____, 874 P.2d 853, 857 (1994).

B. *BURT V. CITY OF IDAHO FALLS* DISTINGUISHABLE

Intervenors rely upon *Burt v. City of Idaho Falls,* 105 Idaho 65, 665 P.2d 1075 (1983), as authority holding that amendments to the comprehensive plan are legislative matters not subject to judicial review. 105 Idaho at 68. However, the issue before that Court was the annexation of property with the amendment to the comprehensive plan and the rezoning being merely the attendant actions mandated by Idaho Code §67-6525.

Annexation is a legislative action. In *Coeur d'Alene Industrial Park Property Owners Association, Inc. v. City of Coeur d'Alene,* 108 Idaho 843, 702 P.2d 881 (App. 1983), Judge Burnett for the Court of Appeals noted that annexation authority under Idaho Code §50-222 long predated the enactment of the Local Land Use Planning Act, Idaho Code §§67-6501 et seq:

> **The act of annexation does not await an exercise of the zoning power. *See Burt v. City of Idaho Falls,* 105 Idaho 65, 665 P.2d 1075 (1983).**
>
> 108 Idaho at 845.

1. **Citation to Cooper Supports Quasi-Judicial**

In *Burt,* the Court cited support in *Cooper v. Board of County Commissioners of Ada County,* 101 Idaho 850, 623 P.2d 462 (1981):

> **In that case the applicants for the rezoning appealed to the district court from a denial of their application. We held that the action of the Board of Commissioners in acting upon a rezoning request was quasi-judicial in nature. Legislative activity by a zoning entity is differentiated from quasi-judicial activity by the result -- legislative activity produces a rule or policy which has application to an open class whereas quasi-judicial activity impacts specific individuals, interests or situations.[4] *Cooper*, supra, 101 Idaho at 410, 614 P.2d at 950. Legislative action is shielded from direct judicial review by "its high visibility and widely felt impact, on the theory that appropriate remedy can be had at the polls." *Id.***
>
> **Applying the test adopted in *Cooper*, we hold that in the annexation of land, the subsequent amendment of the comprehensive plan and the zoning of the annexed land, I.C. §67-6525, the city council acted in a legislative manner, see *Cooper*, supra; *Dawson, supra; Harrell, supra; see also* City of Louisville v. District Court In and For County of Boulder, *190 Colo. 33, 543 P.2d 67 (Colo. 1975); Golden v. City of Overland Park,* 224 Kan. 591, 584 P.2d 130 (Kan. 1978), and that such actions are not subject to direct judicial review. *See, e.g., Dawson, supra.***

Here the amendment to the Comprehensive Plan impacts specific individuals, those owners of acres not given notice and not consenting, and the multiple number of neighboring protestants.

Of particular interest is footnote 4 citing *Allison v. Washington County*, 24 Or. App. 571, 548 P. 2d 188, 190-191 (Or. App. 1976) which sustained as legislative action annexation of ". . .property never before considered within the

plan or zoned by the city to effectuate the plan." 105 Idaho at 67, fn. 4. The Oregon Court of Appeals concluded:

> **"Such zoning is analogous to the initial zoning of the city. New planning and zoning policies are determined and applied to the city's increased zoning jurisdiction. The amendment of the plan and zoning of the annexed property affects the interests of all persons in the city in some manner. Such widely felt impact and high visibility is consistent with action deemed legislative.**
>
> 105 at 67 - 68, fn. 4

The amendment of the Comprehensive Plan on 3,000 acres does not remotely affect ". . .the interest of all persons in the (county) in some manner." The U.S. Bureau of Census placed the population of Kootenai County at 108,685 in 2000 and that number today is substantially higher.

The zone change to allow 1,300 new houses would dramatically affect the interests of a substantial number of those who testified and other neighbors and non-consenting property owners within the Powderhorn Peninsula. All are entitled to a quasi-judicial review.

Four of the cases cited in the *Burt* opinion recognized the general authority of a county or city to enact zoning ordinances with or without a comprehensive plan. Each of these cases arose before the enactment of the Local Land Use Planning Act in 1975, Idaho Code §§67-6501 et. seq. *Dawson Enterprises, Inc. v. Blaine County,* 98 Idaho 506, 567 P.2d 1257 (1977); *Harrell v. City of Lewiston,*

95 Idaho 243, 506 P.2d 470 (1973); *Cole-Collister Fire Protection District v. City of Boise*, 93 Idaho 558, 468 P.2d 290 (1970); *City of Idaho Falls v. Grimmett,* 63 Idaho 90, 117 P.2d 461 (1941).[4]

The final paragraph of the majority opinion cited two additional out-of-state cases in support: *City of Louisville v. District Court in and For County of Boulder*, 190 Colo. 33, 543 P.2d 67 (Colo. 1975) and *Golden v. City of Overland Park,* 224 Kan. 591, 584 P.2d 130 (Kan. 1978). 105 Idaho at 68. The Colorado case involved annexation similar to *Burt* where annexation and new zoning were simultaneously required municipal actions.

2. <u>Dicta in Colorado Case Supports Quasi-Judicial</u>

As previously reported in Petitioners' Brief in Opposition to Motion to Dismiss, the Kansas Supreme Court in *Golden v. City of Overland Park, supra,* made a distinction which supports rather than contradicts the Neighbors' view that Powderhorns' request the to amend the Comprehensive Plan on a specific tract of land, the Powderhorn Peninsula, deserves quasi-judicial review.

The *Golden* case did not involve any attempt to amend a comprehensive plan. The appeal was from the city council denial of a rezoning. The remaining issue

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[4]*Dawson Enterprises, Inc.* began in the county in 1974. *Harrell* involved an annexation.

was whether the conditions placed by the city upon granting a zone change were unreasonable given that the property owner was contending that without a zone change his property had no value. The holding of the Kansas Supreme Court was that the city had been unreasonable.

The part of the opinion relied upon by the Idaho Supreme Court was therefor dicta, but it was nonetheless wise guidance:

> **A city, in enacting a general zoning ordinance, or a planning commission exercising its primary and principal function under K.S.A. 12-704 in adopting and annually reviewing a comprehensive plan for development of a city, is exercising strictly legislative functions. When, however, the focus shifts from the entire city to one specific tract of land for which a zoning change is urged, the function becomes more quasi-judicial than legislative.** ***While policy is involved, such a proceeding requires a weighing of the evidence, a balancing of the equities, an application of rules, regulations and ordinances to facts, and a resolution of specific issues. Keopf v. City of Sterling Heights,*** **391 Mich. 139, 215 N.W.2d 120 (1974);** ***Fleming v. City of Tacoma,*** **81 Wash.2d 292, 502 P.2d 327 (1972);** ***Fasano v. Washington Co. Comm.,*** **264 Or. 574, 574 P.2d 23 (1973); and See** ***Zoning Amendments -- The Product of Judicial or Quasi-Judicial Action,*** **33 Ohio State Law Journal 130 (1972).** (Emphasis Supplied).
>
> 584 P.2d at 135.

The Powderhorn Application for an amendment to the Comprehensive Plan is a ". . .focus shift from the entire (county) to the specific tract of land for which a zone change is urged, the function becomes more quasi-judicial than legislative."

There are two additional Idaho cases that lend support to Neighbors' position on quasi-judicial v. legislative. In *Sprenger, Grubb & Associates, Inc. v. Hailey,*

regulations and ordinances to facts and a resolution of a specific issues." *Golden v. City of Overland Park,* 584 P.2d at 135.

C. RECORD AND AUTHORITIES DICTATE NULLIFICATION

The Powderhorn request for a Comprehensive Plan map amendment from Agricultural to Rural required a quasi-judicial hearing under the test set forth in *Cooper* and reiterated in *Idaho Historic Preservation Council, Inc. v. City Council of the City of Boise, supra*:

> **"Basically, this test involves the determination of whether action produces a general rule or policy which is applicable to an open class of individual, interest (sic) or situations, or whether it entails the application of a general rule or policy to specific individuals, interests, or situations. If the former determination is satisfied, there is legislative action; if the latter determination is satisfied, the action is judicial." *Id.* at 410, 614 P.2d at 950 (quoting *Fasano v. Board of County Comm'rs,* 264 Or. 574, 507 P.2d 23, 27 (1973).[5]**

134 Idaho at 654.

Notice was not given to owners of approximately 1,338 acres of land on the Powderhorn Peninsula. Petitioners adopt and advise the Court to accept the correct conclusion in Intervenors' Powderhorn Communities and Heartland's Opposition Brief:

---

[5]Judge Burnett's opinion in *Gay* was cited twice in *Preservation Council.* 134 Idaho at 635.

If the Application was not a legislative matter, then it would be a quasi-judicial matter and the property owners must be identified and consent to the Application involving their real property.

pp. 4 - 5.

As the brief continues, " . . . the real property owners were not notified. . ." p. 5. Therefore the entire procedure is null and void. The appropriated ruling would not be a remand but judgment declaring the Order of Decision invalid. If they so choose, Powderhorn and Magnuson may go back to the drawing board and initiate a new application that would be subject to full quasi-judicial procedures.

1. Opening Brief Adopted by Reference

Petitioners' Opening Brief need not be regurgitated, but will simply be referenced as the Court may believe it to be applicable. The ex-parte communications between Commissioner Katie Brodie and representatives of Powderhorn are not denied by respondent Kootenai County and Intervenors. Neighbors would assert, as did the successful petitioners-respondents in *Idaho Historic Preservation Council, Inc.,* that the subsequent hearing did not cure the ". . . improper influence from the ex parte communications." 134 Idaho at 654.

The claim of tortious interference with Rand Wichman's employment in the Powderhorn Brief (pp. 37 - 38) and the fear that Wichman must find new employment in the Magnuson Brief (pp. 23 - 24) are gross exaggerations of

Neighbors' complaint directed at the Director going to work for the applicant on a case pending when he resigned.

This objection was exactly the same as with lawyers: Wichman should not have participated in the Powderhorn proceeding because he was privy to all that had happened and was thought within the county including the commissioners. It shocks the conscience. Neighbors did not and could not make any objection to Wichman consulting with or working for any other developer with or against Kootenai County.

All the substantive arguments set forth in Petitioners' Opening Brief of the amendment not being in accordance with but being in violation on the 1994 Comprehensive Plan and that the November 9th and November 16th Findings of Fact and Comprehensive Plan analysis being in hopeless conflict and not supporting the decision are realleged by reference.

CONCLUSION

For all of the above reasons, Neighbors are entitled to judgment.

Respectfully submitted, this 30th day of May, 2007.

Scott W. Reed
Attorney for Petitioners/Plaintiffs

CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing is sent by fax and by first class mail, postage prepaid, this 30th day of May, 2007 to:

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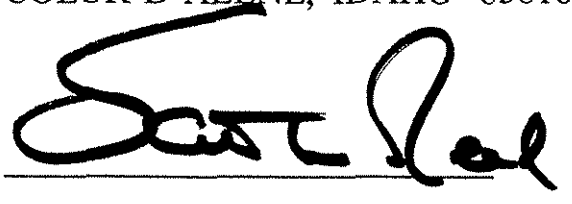

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ORIGINAL

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit, unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON; **Plaintiffs/Petitioners,** **v.** **KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R., "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities;** **Defendants/Respondents,** **and** **POWDERHORN COMMUNITIES, LLC, and HEARTLAND, LLC, and COEUR D'ALENE LAND COMPANY and H. F. MAGNUSON,** **Intervenors/Respondents.**	**Case No. CV-06-8574** **POST HEARING BRIEF OF PLAINTIFFS/ PETITIONERS**

The Court initiated the hearing on June 5th by stating that a recent review of *Price v. Payette County Board of County Commissioners,* 131 Idaho 426, 958 P.2d 583 (1998) had uncovered serious procedural issues not previously discussed. Undersigned counsel had found in the same case support upon another issue, but had missed implications of the multiple hearing holding.

The Court has allowed Neighbors to provide additional authority to support the quotation taken from Intervenor's brief that all property owners must consent to a Comprehensive Plan amendment affecting their property. That will be done, but in the broader context of questioning the whole amendment process almost *ab initio*.

I. Comp Map Change Notice Erroneous and not Given Personally

What has become clear in further review of the colored zoning maps provided to Court and counsel and in looking at Agency Record, Volumes 1 and 2, is that there are major flaws in the entire procedure beginning with the initial letter from JUB Engineers to Rand Wichman on December 16, 2005. Powderhorn Communities, LLC and Heartland, LLC joined by Blakely, Magnuson and East Point Farm, Inc. (hereinafter Powderhorn) applied for an amendment to the Kootenai County Comprehensive Plan Future Land Use Map. That letter identified the map changes to include the following:

- **Amend the land use designated for 2,725 acres currently designated Agricultural to Rural Residential.**

- **Amend the approximately 40 acres of land located on the east side of Highway 97 that is in common ownership with lands on the west side of Highway 97 from Timber to Rural Residential; and**

- **Amend the land use designation for those lands currently designated Federal Lands to include an overlay designation of Rural Residential in the event ownership of these lands becomes private (approximately 181 acres, or 6 percent of the land area on the Peninsula).**

Agency Record, Vol. 1, pp. 57 -58.

The county accepted the application as presented. Attached here to are copies of the following:

Exhibit 1: Mark Mussman's December 19, 2005 memorandum to all agencies (Vol. 2, p. 235).

Exhibit 2: Mussman follow up on April 4, 2006 (Vol. 2, p. 234).

Exhibit 3: Colored existing zoning map (Vol. 2, p. 260.)

Exhibit 4: Colored outline of the area to be subject to the amendment (Vol. 2, p. 261).

Exhibit 5: The certification of publication of notice of the planning commission hearing on April 27, 2006 (Vol. 2, pp. 263 - 264).

Exhibit 6: Confirmation of map preparation and notice by Mark Mussman (Vol. 2, p. 265) bearing several dates in March and April, 2006 (Vol. 2, p. 225).

The publication and documents related to hearings before the board of Commissioners are identical to those before the planning commission as attached. See Vol. 1, pp. 100, 101, 117, 118, 119, 121, 122, 231, 232 and 233.

Each of the published notices in part and each of the posted notices in full stated:

> **The applicant requests to change the future land use designation on approximately 2,725 acres from Agricultural, Timber and Federal to Rural Residential. The majority of the site is located on the west side of Highway 97 with a small portion of the site located on the east side of Highway 97 in the Powderhorn Bay area approximately 3 miles north of Harrison, Idaho. The site is described as all or portions of Sections 15, 21, 22, 23, 25, 26, 27, 34 and 35, Township 48 North, Range 4 West, B.M., Kootenai County.**

See Vol. I, p. 119 and all of the above cites.

The drawing posted for the public hearing before the Planning Commissioner on April 27, 2006 for "an amendment to the Kootenai County Comprehensive Plan Future Land Use Map" and repeated for all other hearings outlines for change the entire Powderhorn Peninsula and identifies the section numbers. Vol. 1, p. 232. Exhibit 4.

What is apparent from the 2005 Kootenai County Zoning District Map and from the enlargement of the Powderhorn Peninsula that follows is that a substantial amount of the Powderhorn Peninsula was in 1995 and apparently had been since 1975 classified as "Rural Residential. Exhibit 3.

The depiction prepared by mapping manager Joe Johns in the Kootenai County Assessor's Office shows that the proposed amendment would not, in fact, make any change whatsoever on the entire yellow "Rural Residential" area with the only change of "Agriculture" being on the properties of the applicants and of the six properties owned by Frank Boss, Dr. R. J. Stroebel and R. W. Justad.

The 1995 Comprehensive Plan itself did not place any recommended zone upon any properties. It identified and described zones and gave generalities as to what should be in such zones.

It is the 1995 Kootenai County Comprehensive Plan Future Land Use Map that Powderhorn sought to amend. However, for all that the 1995 Land Use map depicted as "Rural Residential" (yellow), there was not to be any change in the amendment proposed by Powderhorn.

Every property that was yellow on the map in 1995 would be unchanged by the application by Powderhorn as commenced in December of 2005.

The representations made in the published notice and in the posted map were inaccurate and misleading. All of the land in Sections 15, 21, 28, 34 and 35 was in 1995 classified as "Rural Residential" as were substantial parts of the land in Sections 22, 23 and 27.

The acreage that Powderhorn Communities, LLC and Heartland, LLC and their fellow applicants could legally and legitimately seek to have the Land Use Map changed from "Agriculture/Timber" to "Rural Residential" was their ownership of 1,662 acres, not the advertised 2,725 acres.

The statute upon notice for the comprehensive plan amendments is contained in Idaho Code 67-6511 (b):

> **. . .provided that in the case of a zoning district boundary change, and notwithstanding jurisdictional boundaries, additional notice shall be provided by mail to property owners or purchasers of record within the land being considered, and within three hundred (300) feet of the external boundaries of the land being considered, and any additional area that may be impacted by the proposed change as determined by the commission. Notice shall also be posted on the premises not less than one (1) week prior to the hearing. When notice is required to two hundred (200) or more property owners or purchasers of record, alternate forms of procedures which would provide adequate notice may be provided by local ordinance in lieu of posted or mailed notice.**

The Kootenai County Zoning Code provides the alternate form of procedure:

> **SECTION 27.06 PUBLIC HEARING REQUIRED BY BOARD OF COUNTY COMMISSIONERS - NOTICE**
>
> **A. Amendments to this Ordinance and Map may be adopted only after a public hearing has been held in relation thereto before the Board of County Commissioners in which parties in interest and citizens shall have an opportunity to be heard. Notice complying with relevant provisions of the Idaho Code shall be provided.**
>
> **B. When notice is required to two hundred (200) or more property owners, the Director may stipulate that notice be posted at additional conspicuous locations along arterial and/or collector**

roads in the vicinity of the application site, that notice be posted at facilities operated by political subdivisions in the general vicinity, and that a one-quarter page advertisement in the official newspaper of the County be published of the proceedings.

In the hearing on June 5th, the Court asked counsel for the county as to what notice was given. Civil Attorney John Cafferty replied that property owners to whom notice was required numbered over 200 so that notice was published rather than sent personally. The Agency Record contains numerous affidavits of publication of notice of meetings of the planning commission and of the county commissioners. Agency Record, Vol. 1. pp. 100, 231, 232, 233; Vol. 2, pp. 263, 270, 271, 284.

There is absolutely no evidence in the record to sustain the contention that there are more than 200 properties within 300 feet of the exterior boundaries of these 1,662 acres. It is apparent from the record and from attorney Cafferty's response to the Court's question that the county planners acted as if the entire Powderhorn Peninsula, which appeared to contain more than 200 separate ownerships outside of the 1,662 acres, was big enough to allow publication of notice.

In *McCuskey v. Canyon County*, 123 Idaho 657, 851 P.2d 953 (1993), the Idaho Supreme Court noted that Idaho Code 67-6511 (b) specifically "provided that in the case of the zoning district boundary change additional notice shall be

provided by mail to property owners or purchasers of record in the land being considered."

The effect of the amendment approved on November 7, 2006 was that the six parcels of real property zoned as Agriculture in the 1995 Future Land Use Map not owned by Powderhorn were changed to "Rural." Those six parcels of land are owned by Frank Boss, Dr. R. J. Stroebel and R. W. Justad who did not join in the application. There nothing in the record to indicate that notice was specifically given to any of these three owners. In the above cited case, the Court held:

> **Further, as the amendment effected a zoning district boundary change as to McCuskey's land, McCuskey was entitled to a mailed notice of the hearing pursuant to Idaho Code 67-6511 (B) . . . A zoning ordinance enacted without complying with the state enabling statutes is ineffectual.**
>
> .123 Idaho at 663.

Powderhorn sought to change the Future Land Use Map for the unzoned federal property at Bell Bay to "Rural Residential." The United States did not consent nor is there any evidence in the record of notice being given to any representative of the United States.

After the Planning Commission recommendation for rejection, the applicants changed the ultimate goal from "Rural Residential" to "Rural." Is the effect of the November 7, 2006 Board of Commissioners approval to place all the property which had been yellow "Rural Residential" into future classification of tan "Rural"

from minimum lot size of 8,250 square feet to minimum lot size of five (5) acres? Is there a potential taking triggering the right to request a regulatory taking analysis under Idaho Code §67-6234 (c) and §67-8003?

Powderhorn in its application represented to the Kootenai County Planning Department that the Comprehensive Plan Future Land Use Map should be changed from "Agriculture/Timber" to "Rural Residential" and the county accepted and acted upon that representation with published and posted notices.

After recommendation of rejection by the Planning Commission, Powderhorn accepted the suggestion of the county planners to switch from "Rural Residential" (8,202 square feet minimum) to "Rural" (5 acres).

For all of the property zoned as "Agriculture/Timber," that change was liberalizing toward development.[1] But for all of the property zoned "Rural Residential," the change to "Rural" was downgrading restricting the owners' future development possibilities.

If the Comprehensive Plan amendment as approved by the Board of County Commissioners is affirmed, any owner of real property which was "Rural

---

[1]The change may still be adverse to Boss, Stroebel and Justad who may not want the loosening up.

Residential" before November 9, 2006 cannot divide his, her or its property into any lot less than five (5) acres in size.

Although Powderhorn had agreed to change its request for amendment from "Rural Residential" to "Rural," the official posted and published notice for the hearing before the Board of Commissioners for September 14, 2006 stated that the map amendment was for ". . .approximately 2,725 acres from Agricultural, Timber and Federal to Rural Residential." Vol. 1, p. 119.

The *very first time* any property owner on the Powderhorn Peninsula in a "Rural Residential" zone would have been able to learn that the owner's property has been reclassified to "Rural" would have been from the official publication on November 13, 2006 of the Board of Commissioners action on November 9, 2006. Vol. 1, p. 100.

The *McCuskey* opinion cited and quoted from *Jerome County v. Holloway*, 118 Idaho 681, 799 P.2d 969 (1990), in which the District Court and the Idaho Supreme Court declared that an amendment to the Comprehensive Plan under Idaho Code §67-6509 (a) and (b) was invalid. In that case, the initial notice of hearing published more than fifteen (15) days prior to the hearing was not complete or accurate. The correction published seven days later was accurate, but less than fifteen days before the hearing:

The notice of hearing requirements of I.C §67-6509 were therefore not met.

This Court confronted this issue in the case of *Citizens for a Better Government v. County of Valley,* 95 Idaho 320, 508 P.2d 550 (1973), and quoted with approval the Supreme Court of the State of California, as follows:

> **"When the statute requires notice and hearing as to the possible effect of a zoning law upon property rights the action of the legislative body become quasi judicial in character, and the statutory notice and hearing then becomes necessary in order to satisfy the requirements of due process and may not be dispensed with. *Hurst v. City of Burlingame,* 207 Cal. 124, 277 P. 308 (1929."**

***Citizens for a Better Government,* 95 Idaho at 322, 508 P.2d at 552.**

In *Citizens for a Better Government,* this Court held:

> **"It is a well settled principle that notice and hearing requirements in zoning enabling acts are conditions precedent to the proper exercise of the zoning authority. *Hart v. Bayless Investments & Trading Co.,* 86 Ariz. 379, 346 P.2d 1101 (1959); *Holly Development, Inc. v. Board of County Comm'rs,* 140 Colo. 95, 342 P.2d 1032 (1959). *Id."***

118 Idaho at 684.

Note that the requirements of a statute as to notice are to be judged under the quasi-judicial standard.

To Summarize

(1) The initial application seeking to amend the zoning map as to the entire Powderhorn Peninsula was incorrect and erroneous.

(2) The multiple published and posted notices repeated those errors.

(3) There is no evidence in the record to support that there were more than 200 property owners within 300 feet of the "Agriculture/Timber" zone which was the only area subject to the amendment.

(4) Three non-consenting owners of six parcels of property zoned Agriculture were not personally notified.

(5) The United States was not notified.

(6) The final November 7, 2006 decision of the Board of County Commissioners changed the Kootenai County Comprehensive Plan Future Land Use Map for the "Rural Residential" (yellow) property on Powderhorn Peninsula to the more restrictive "Rural" (tan) of one residence for five acres.

(7) No notice of any kind, personal, posted or published, was ever given to any property owners in what had been zoned as "Rural Residential" before the Future Land Use Map had changed the zone to "Rural."

The amendment to Kootenai County Comprehensive Plan Future Land Use Map was made upon unlawful procedure. Idaho Code §67-5279 (3) (c).

II. I.C. §67-6509 (b) Mandates Second Hearing by Board.

Following up on *Price v. Payette County, supra,* the Court looked to Idaho Code §67-6509 (b). The simple purpose here is to associate the dates of record with the statutory wording in §67-6509 (b).

> **(b) The governing board, as provided by local ordinance, prior to adoption, amendment, or repeal of the plan, may conduct at least one (1) *public hearing*, in addition to the public hearing(s) conducted by the commission, using the same notice and hearing procedures as the commission.** (Emphasis supplied).

April 27, 2006	Public hearing before Kootenai County Planning Commission.
May 20, 2006	Planning Commission voted unanimously to recommend denial of the amendment.

> **The governing board shall not hold a public hearing, give notice of a proposed hearing, nor take action upon the plan, amendments, or repeal until recommendations have been received from the commission.**

September 14, 2006	Public hearing before the Kootenai County Board of Commissioners.
October 4, 2006	Public hearing before Kootenai County Board of Commissioners limited to site visit issues.

Following consideration by the governing board, if the governing board makes a material change in the recommendation or alternative options contained in the recommendation by the commission concerning adoption, amendment or repeal of a plan, further notice and hearing shall be provided before the governing board adopts, amends or repeals the plan.

October 5, 2006	Commissioners Johnson and Brodie voted to grant amendment. Commissioner Currie vote "no."

November 9, 2006 — Commissioners Johnson and Brodie signed Order of Decision granting amendment as sought.

November 16, 2006 — Commissioners signed Amended Order of Decision.

The approval of the amendment was a material change from the denial recommended by the Planning Commission. There was no further *public hearing*.

Only after the Board follows the correct procedures on remand in amending the Comprehensive Plan can the Board consider Bone's request for an amendment to the zoning ordinances.

Price v. Payette County, 131 Idaho at 430.

Respectfully submitted, this 11th day of ~~June,~~ 2007.

Scott W. Reed
Attorney for Petitioners/Plaintiffs

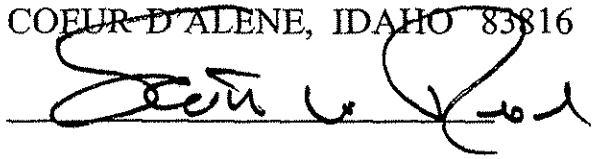
CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing is sent by first class mail, postage prepaid, this 11th day of June, 2007 to:

JOHN CAFFERTY, ESQ.
KOOTENAI COUNTY DEPT. OF
LEGAL SERVICES
451 GOVERNMENT WAY
P. O. BOX 9000
COEUR D'ALENE, IDAHO 83816-9000

MISCHELLE FULGHAM
LUKINS & ANNIS, P.S.
ATTORNEYS AT LAW
1600 WASHINGTON TRUST
FINANCIAL CENTER
717 WEST SPRAGUE AVENUE
SPOKANE, WA 99204-0466

JOHN F. MAGNUSON
ATTORNEY AT LAW
P. O. BOX 2350
COEUR D'ALENE, IDAHO 83816



KOOTENAI COUNTY BUILDING & PLANNING DEPARTMENT

December 19, 2005

TO: East Side Fire District
Panhandle Health District
City of Harrison
Idaho Department of Lands
Department of Environmental Quality
Kootenai Metropolitan Planning Organization
East Side Highway District
Kootenai School District #274
Idaho Transportation Department
Idaho Fish & Game

FROM: Mark Mussman, Planner III M. Mussman

RE: Comprehensive Plan Amendment
Case No. CP-080-05

Powderhorn Communities, LLC is requesting an amendment to the Future Land Use Map of the Kootenai County Comprehensive Plan. They are proposing to change the land use designation on approximately 2,750 acres from Agricultural to Rural Residential. The site is located in the Powderhorn Bay area west of Highway 97 and on both sides of East Point Road. The Applicant does not propose any designation change to the land located along the Lake Coeur d'Alene that is currently designated as Open Space.

Parcel Numbers: Available upon request

Property Owners: Numerous

Applicant: Powderhorn Communities LLC, c/o Heartland LLC, 524 Second Avenue, Suite 200, Seattle, WA 98104.

Consultant: Brad Marshall, J-U-B Engineers, Inc. 7825 Meadowlark Way, Suite A, Coeur d'Alene, ID 83815.

Property Description: *Legal Description:* All or portions of Sections 14, 15, 22, 23, 26 and 27, Township 48 North, Range 4 West. *Location:* The site is generally located on the Powderhorn Peninsula west of Highway 97 on both sides of East Point Road.

Attached is the information submitted with this request. Please review and provide comments within 30 days. If you have no comments, please advise us accordingly. Should you require additional information, please contact us or the Applicant's consultant. Thank you for your assistance and cooperation.

Cc: Brad Marshall

PHONE (208) 446-1070 • FAX (208) 446-1071
451 GOVERNMENT WAY • P.O. BOX 9000 • COEUR D'ALENE, ID 83816-9000

KOOTENAI COUNTY BUILDING & PLANNING DEPARTMENT

April 4, 2006

TO: East Side Fire District
Kootenai School District #274
Idaho Transportation Department
City of Harrison
Kootenai Metropolitan Planning Organization
East Side Highway District

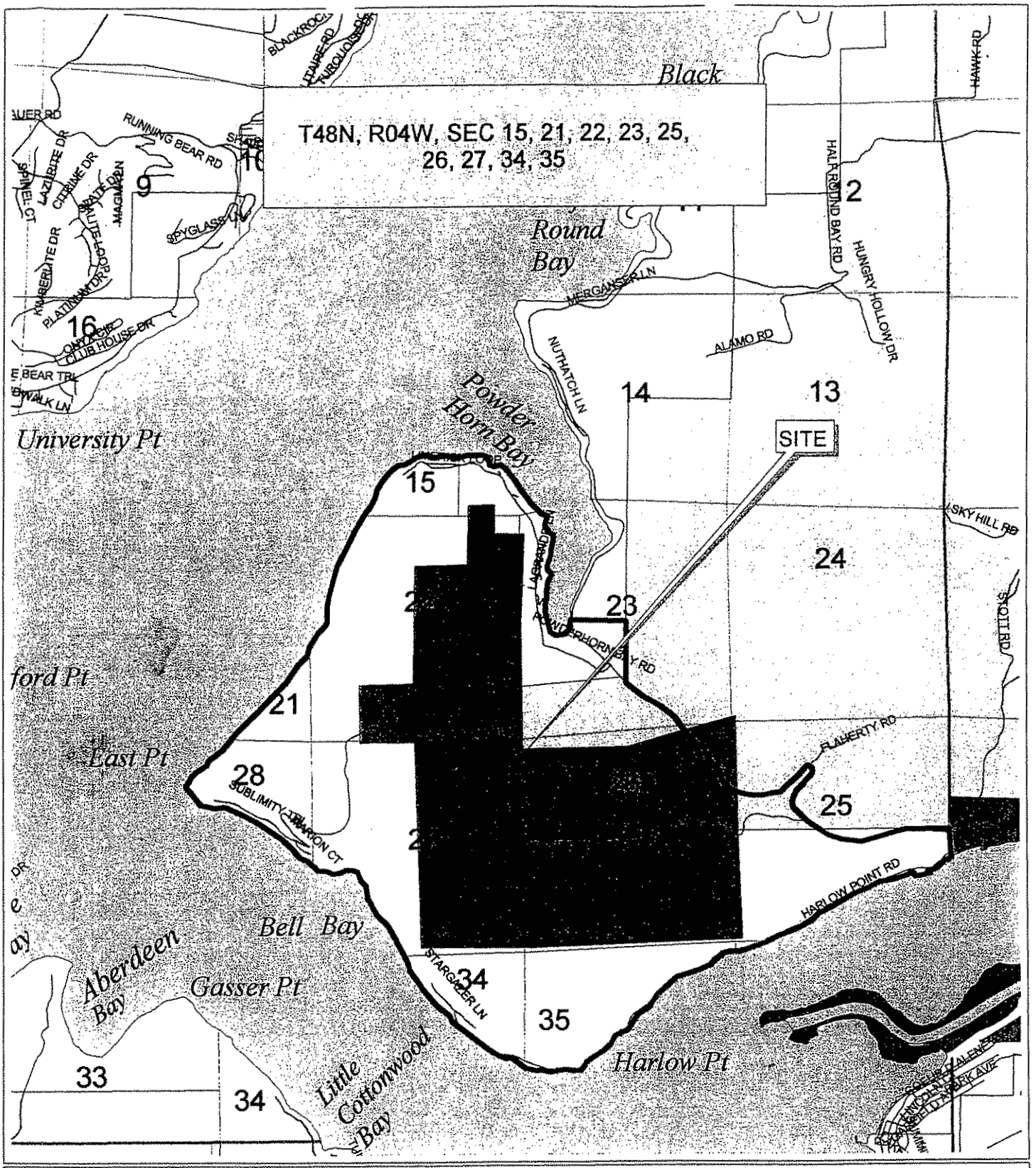
FROM: Mark Mussman, Planner III

RE: Comprehensive Plan Amendment
Case No. CP-080-05

On December 19, 2005, the Kootenai County Building and Planning Department solicited comments regarding the above referenced Comprehensive Plan Amendment. As you may recall, the Applicant is requesting an amendment to the Future Land Use Map to change the designation of approximately 2,700 acres from Agricultural to Rural Residential.

Since that time, the Applicant has submitted additional information regarding transportation issues and the viability of agricultural and timber activity in the area. Please review this additional information and provide any updated comments, if necessary, at your earliest possible convenience. Thank you for your assistance and cooperation.

PHONE (208) 446-1070 • FAX (208) 446-1071
451 GOVERNMENT WAY • P.O. BOX 9000 • COEUR D'ALENE, ID 83816-9000



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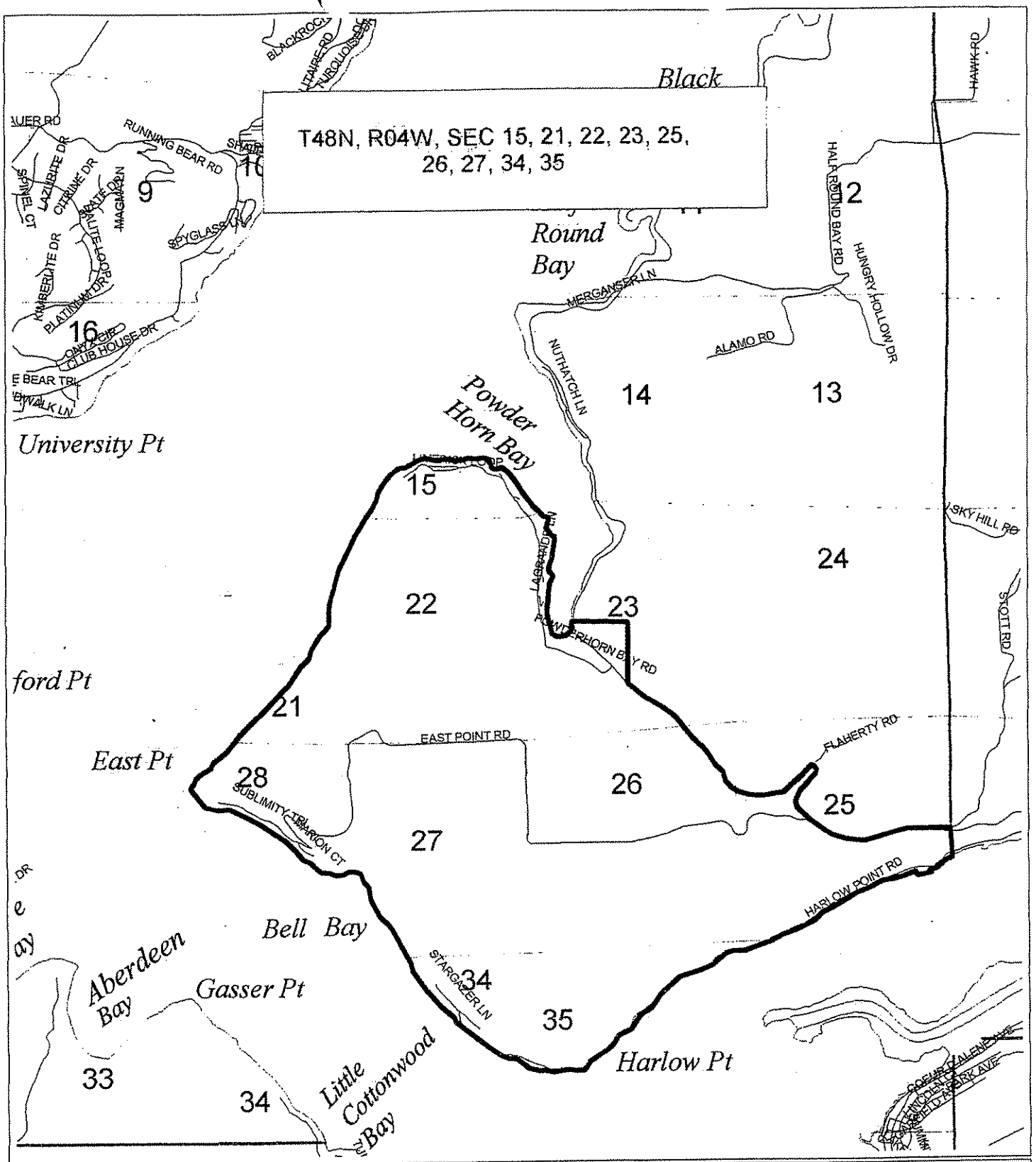
CP-080-05
POWDERHORN COMMUNITIES LLC

1000 0 1000 2000 3000 4000 5000 Feet

Zoning Districts
- AG-SUBURBAN
- AGRICULTURE
- COMMERCIAL
- COMMERCIAL DEVELOPMENT
- HIGH DENSITY RESIDETIAL
- INDUSTRIAL
- LIGHT INDUSTRIAL
- LIGHT INDUSTRIAL DEVELOPMENT AGREEMENT
- MINING
- MINING DEVELOPMEN
- RESTRICTED RESIDEN
- RURAL
- RURAL DEVELOPMEN

Date Printed: 3-15-06
Geographic Information Services

S-11



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CP-080-05
POWDERHORN COMMUNITIES LLC

1000 0 1000 2000 3000 4000 5000 Feet

Date Printed: 3-15-06
Geographic Information Services

Zoning Districts
- AG-SUBURBAN
- AGRICULTURE
- COMMERCIAL
- COMMERCIAL DEVELOPMENT
- HIGH DENSITY RESIDETIAL
- INDUSTRIAL
- LIGHT INDUSTRIAL
- LIGHT INDUSTRIAL DEVELOPMENT AGREEMENT
- MINING
- MINING DEVELOPMENT AGREEMENT
- RESTRICTED RESIDENTIAL
- RURAL
- RURAL DEVELOPMENT AGREEMENT

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AFFIDAVIT OF PUBLICATION

Case No. CP-080-05

The above-referenced case was published in the Coeur d'Alene Press on or before 3.30.06.

CERTIFICATION

I hereby certify that the attached is a true copy of the notice published in the *Coeur d'Alene Press* as stated above.

BY:
Planning Secretary

Jan Vera

****
*** TX REPORT ***
****

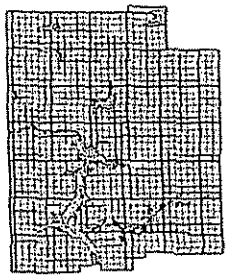
TRANSMISSION OK

TX/RX NO	1320
CONNECTION TEL	96640212
SUBADDRESS	
CONNECTION ID	
ST. TIME	03/14 08:18
USAGE T	00'16
PGS. SENT	1
RESULT	OK

NOTICE OF PUBLIC HEARING

NOTICE IS HEREBY GIVEN that the Kootenai County Planning Commission will conduct a public hearing at or after the hour of 6:00 p.m. on April 27, 2006 in the Kootenai County Administration Building Meeting Room 1, 451 Government Way, Coeur d'Alene, Idaho to hear the following: **Case No. CP-080-05, a request by Powderhorn Communities LLC** for an amendment to the Kootenai County Comprehensive Plan Future Land Use Map. The Applicant requests to change the future land use designation on approximately 2,725 acres from Agricultural, Timber and Federal to Rural Residential. The majority of the site is located on the west side of Highway 97 with a small portion of the site located on the east side of Highway 97 in the Powderhorn Bay area approximately 3 miles north of Harrison, Idaho. The site is described as all or portions of Sections 15, 21, 22, 23, 25, 26, 27, 34 and 35, Township 48 North, Range 4 West, B.M., Kootenai County, Idaho. Written comments must be received ten (10) days prior to the date of the hearing. If you require special accommodation, please contact the Kootenai County Building and Planning Department seven (7) days prior to the public hearing. Further information can be obtained from the Kootenai County Building and Planning Department, 451 Government Way, P.O. Box 9000, Coeur d'Alene, Idaho 83816-9000, (208) 446-1070.

Publication Date: Thursday, March 30, 2006



Kootenai County GIS Services

PO Box 9000, CDA, ID 83816-9000 Dave Christianson – GIS Manager (X1390)
Jay Lockhart – GIS Technician (X1391)

Request for Map Preparation

Application # CP-080-05

Name of Applicant / Application Powderhorn Communities LLC

Parcel #(s): Attachments

Other Description (if needed): Attachments

Planner / Staff Contact Person & Phone # Mark Mussman / Jan @ 1081

Type of Map Set Requested: Zone Change - Comp Plan Amendment - Variance - Conditional Use - Plat

Other: _____

Date of Application: _____

Deadline Dates:

Resident Notice / Site Posting	Area of Impact Notification	Staff Report	Hearing
4.6.06	done	4.10.06	4.27.06

Map Components Requested:

- [x] *Standard Hearing Map-Set*
- [ ] Resident Notification / Site Posting Map Flyer 8.5x11
- [ ] Parcel Map (Radius:_____) 8.5x11 - 11x17 - 18x24 - 30x36 - 36x48 #____
- [ ] Zoning Map (Radius:_____) 8.5x11 - 11x17 - 18x24 - 30x36 - 36x48 #____
- [ ] Comp Plan Map (Radius:_____) 8.5x11 - 11x17 - 18x24 - 30x36 - 36x48 #____
- [ ] Aerial Photo (Radius:_____) 8.5x11 - 11x17 - 18x24 - 30x36 - 36x48 #____
- [ ] Transparencies 8.5x11

Other Special Map Requests and/or Comments:

(Filled in by Requestor)
Date of Request: 3.14.06 Date Due: 4.6.06

(Filled in by GIS)
Date Received by GIS_____ Prepared By (GIS):_____ Date Completed:_____

Accepted By (PZ): _____ Date Received: _____

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537

ORIGINAL

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

2007 JUN 12 PM 3:24

CLERK DISTRICT COURT

DEPUTY

Kootenai County
Department of Legal Services
451 Government Way
P.O. Box 9000
Coeur d'Alene, Idaho 83816-9000
John A. Cafferty, Civil Attorney ISB #5607
Phone: (208) 446-1626
FAX: (208) 446-1621

Attorney for Defendants/Respondents

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit, unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON, Plainitffs/Petitioners, vs. KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually, Defendants/Respondents.	Case No. CV-06-8574 KOOTENAI COUNTY'S SUPPLEMENTAL BRIEFING

and,

HEARTLAND LLC and POWDERHORN COMMUNITIES, LLC, and COEUR D'ALENE LAND COMPANY and H.F. MAGNUSON,

Intervenors.

COMES NOW, the Respondent, Kootenai County, by and through its attorney of record, John A. Cafferty, Kootenai County Department of Legal Services, and hereby submits Kootenai County's Supplemental Briefing as follows:

I. PROCEDURAL HISTORY

On June 5, 2007, this matter was fully submitted to this Court with oral argument being set for the same, June 5, 2007. Full briefing schedules having already been set and responded to. On June 5, 2007, the Court sua sponte raised the issue of Idaho Code §67-6509 as interpreted by *Price v. Payette County*, 131 Idaho 426, 958 P.2d 853 (1998). As a result of this new issue being brought forth, the Court graciously allowed the parties additional briefing time to address this issue. Below is Kootenai County's response to the issues presented by the Court on June 5, 2007.

The difficulty that the Court is faced with as to whether the present matter is a quasi-judicial or a quasi-legislative action by the Board of County Commissioners in the County of Kootenai. This is a difficulty which Kootenai County faced early in the process. As previously noted by the Court, this matter does not squarely fit into either the legislative or the quasi-judicial functions of the

County. The difficulty with the notice is a result of the fact that the boundaries of a Comprehensive Plan Land Use Map are not clear cut and easily distinguishable, unlike a zoning boundary line. The boundaries in a Comprehensive Plan Land Use Map may, and are, intended to be somewhat blurry and can be expected to give only a guide and not a clear distinction. These boundaries can, and are intended to be rough generalizations that can overlap by significant distances. The Kootenai County Comprehensive Plan, Part One, Summary of Findings, page 20, *a copy of which is attached hereto for ease of reference as Exhibit "A".*

This lack of specific boundaries makes it impossible to provide the type of precise mailed notice as would be required in a zone change. *See Idaho Code §67-6511(b)* . . .

> "A governing board may adopt or reject an ordinance amendment pursuant to the notice and hearing procedures provided by §67-6509, Idaho Code, provided that in the case of a zoning district boundary change, and notwithstanding jurisdictional boundaries, additional notice shall be provided by mail to property owners or purchasers of record within the land being considered, and within three hundred (300) feet of the external boundaries of the land being considered, and any additional area that may be impacted by the proposed change as determined by the Commission".

As a result of the inability to clearly distinguish the external boundaries of the proposed Comprehensive Plan Land Use Map change, Kootenai County relied upon the notice requirements layed out in Idaho Code §67-6509 dealing with amendments to the Comprehensive Plan.

Further blurring the procedural distinctions between the actions of the Board as a quasi-legislative and a quasi-judicial body, are the requirements of

the Idaho Open Public Meeting laws, Idaho Code §67-2341 *et seq.*

Before a thorough evaluation of Idaho Code §67-6519, as interpreted by *Price v. Payette County, supra,* can be entered into, it is important to remember the facts of the case at bar. The present matter involves the filing of a Petition for Judicial Review and the subsequent amendment of that Petition to include an action for declaratory judgment. The matter that is being appealed is not a zone change application, but rather an application for amendment to the Comprehensive Plan Land Use Map. *See AR, Volume I, pp. 67-81.* As will be discussed below, this is an important distinction from a true Comprehensive Plan amendment. This application is limited in scope to an amendment of the Land Use Map.

II. DISCUSSION

A. A Zoning Map Amendment is Not a Comprehensive Plan Amendment.

In *Bone v. City of Lewiston,* 107 Idaho 844, 693 P.2d, 1046 (1984), the Idaho Supreme Court clarified the distinction between a full Comprehensive Plan amendment and an amendment to the Land Use Map,

> A Land Use Map, then, is not the Comprehensive Plan, but only a subpart of one of twelve components which go into the making of a plan.

Bone at 849, 1051, Footnote 7.

This is an important distinction in light of the present discussions being undertaken in this case.

Bone v. City of Lewiston was a case dealing with a situation where a landowner requested a zone change of the City of Lewiston to rezone his

property in compliance with the existing Comprehensive Plan. The rezone was denied and the landowner (Bone) filed suit against the City, requesting declaratory relief and a Writ of Mandamus forcing the City to enact a zoning ordinance in conformity with its Comprehensive Plan. The District Court ruled in favor of the landowner. The Supreme Court reversed, holding that the appeal should have been reviewed under the provisions of the Administrative Procedures Act.

While the law relied upon by the Court in *Bone* has been recodified, the principles remain the same, and in fact the language is quite similar. In finding that an administrative review should have been had as opposed to a declaratory judgment, the Court stated:

> "We find §67-5215(b-g) to be a complete, detailed, and exhaustive remedy upon which an aggrieved party can appeal and adverse zoning decision. We also find that the Legislature's intent in outlining the scope of review and the basis upon which a Court may reverse a governing body's zoning decision to be clear. We find no evidence that the Legislature intended other avenues of appeal to be available, or that basis for reversal or the scope of review should be broader than that found in §67-5215(b-g). Thus, we hold that §67-5215(b-g) is the exclusive source of appeal for adverse the zoning decisions. To hold otherwise would render the mandate of §67-5215(b-g) meaningless, for it would allow an applicant to bypass §67-5215(b-g) by seeking different avenues of appeal with different levels of judicial scrutiny. This is what Mr. Bone has improperly done here".

Bone at 848-849, 1049-1050.

The Court in *Bone* makes it quite clear that judicial review of agency actions is the proper avenue as recourse for a party aggrieved by a land use decision, and that declaratory judgment is not a proper remedy, absent an

applicant exhausting the full appellate process of a cold record.

> Mr. Bone argues, however, that I.C. §67-6519 and 5215(b-g) do not preclude him from bringing his cause of action. Mr. Bone contends that, not withstanding §67-5215(b-g), he can seek a declaratory judgment interpreting the statute and a Writ of Mandamus, requiring the City to comply with the statute as interpreted. His reason is that he is not appealing his zoning decision, but rather seeking an interpretation of the statute. Such an argument exalts form over substance. The fact is, Mr. Bone applied for a rezoning. The City denied his application, and because his application was denied, he subsequently appealed to the District Court. Simply because Mr. Bone's theory in appealing his rezone application is that §67-6511 entitles him to the rezone, does not mean that he is not appealing the City's decision. Accordingly, his appeal should have been reviewed under §67-5215(b-g)'s guidelines.

See Bone at 849, 1051.

B. *The issue of whether or not Idaho Code §67-6509 was properly complied with was waived, as it was never raised by the Petitioners.*

See Roel v. City of Boise, 134 Idaho 214, 999 P.2d 251 (2000) and *Whitehawk v. State*, 119 Idaho, 168, 804 P.2d 341 (Ct. App. 1991).

Idaho case law makes it clear that even constitutional issues not raised before a Board of County Commissioners will not be considered on appeal. *See Butters v. Hauser*, 125 Idaho 79, 82, 867 P.2d 953, 956 (1993). *See also Cowan v. Board of Commissioners of Fremont County, 143 Idaho 501, 148 P.3d 1247, 1257 (2006).*

C. *Idaho Code §67-6509 hearing requirements go to due process.*

While it has been argued by the parties that §67-6509 may or may not have required a total of three hearings, two in front of the Board of County

Commissioners as the final authority, what is clear is the fact that Idaho Code §67-6509 was enacted so as to give all parties with an interest in an amendment to the Comprehensive Plan an opportunity to participate if they are interested in the issue being considered, a due process consideration.

See Cooper v. Board of County Commissioners of Ada County, 101 Idaho 407, 614 P.2d 947 (1980).

> Our Supreme Court held that a deprivation of due process resulted from (a) failure to give notice of a second meeting of zoning authorities (after a public hearing), a rezoning request was considered and staff views were discussed; (b) failure to keep a transcribable verbatim record of the proceedings before the zoning authorities; and, (c) failure to make specific written findings of fact and conclusions of law, upon which the decision on the rezoning decision was based.

See Cooper at 411, 951.

The Court of Appeals in *Angstman v. City of Boise,* 128 Idaho 575, 917 P.2d 409 (Ct. App. 1996), layed out the requirements for procedural due process and stated:

> "Due process safeguards apply to quasi-judicial proceedings, such as those conducted by zoning boards in considering whether to grant a conditional use permit." *Chambers v. Kootenai County Board of Commissioners,* 125 Idaho 115, 118, 867 P.2d 989, 992 (1994). In such situations, due process requires: (a) notice of the proceedings, (b) a transcribable verbatim record of the proceedings, (c) specific, written findings of fact, and, (d) an opportunity to be present and rebut evidence. *Id., citing Cooper v. Board of County Commissioners of Ada County,* 101 Idaho 407, 615 P.2d 947 (1980) and *Gay v. County Commissioners of Bonneville County,* 103 Idaho 626, 651 P.2d 560 (Ct. App. 1982). Angstman does not claim that the Council denied him any of these enumerated due process requirements. Indeed, the record shows that he was given notice of

> all relevant proceedings; verbatim records were made available to him, as were specific written findings of fact by the Planning & Zoning Commission and the Council; and, Angstman was given an opportunity to present and rebut evidence at each hearing.

Angstman v. City of Boise, 128 Idaho 575, at 578, 917 P.2d 409, at 412 (Ct. App. 1996).

The facts in the case at bar clearly afforded all parties interested the requisite due process. The matter that was pending in front of the Planning & Zoning Commission, and the matter that was pending in front of the Board of County Commissioners where the same issues, to-wit: the applicants were requesting an amendment to the Comprehensive Land Use Map to change the Comprehensive Plan Map designation of their properties from primarily agricultural to rural. While the position taken by the Planning & Zoning Commission was that the application should be denied, the application did not change. The application that was heard by the Planning & Zoning Commission, and subsequently recommended for denial to the Board of County Commissioners, was the same application as was heard by the Board of County Commissioners.

Further, the notice of the hearing in front of the Planning & Zoning Commission was substantially the same as the notice that was given for the hearing in front of the Board of County Commissioners. It is also informative to note that the transcript of the hearing in front of the Planning & Zoning Commission consisted of approximately 89 pages, see *Supp. TR, Volume 1 of 1, pp. 1-89.* While the transcript of the hearings in front of the Board of County

Commissioners consisted of approximately 85 pages, *see Tr. Volume 1 of 1, pp. 19-104.* While an exhaustive page by page analysis of the testimony is not undertaken here, the similarity in the amount of time and the amount of testimony taken between the two hearings seems to suggest that the same and/or similar persons appeared in front of the two different bodies and made the same or similar arguments on both sides of the issue.

The case at bar is not a situation where, like a true Comprehensive Plan amendment, the Board of County Commissioners changed the issue that was being discussed from what was previously proffered by the Planning & Zoning Commission and therefore resulted in far reaching effects to persons without notice of the actions being contemplated. Here, both bodies were faced with the same proposal and arrived at different conclusions after weighing the facts in the record.

D. Idaho Code §67-6509 was complied with.

To the extent that this Court determines that an amendment to the Comprehensive Land Use Map (only one component of a Comprehensive Plan) is required to conform to the full hearing process required of a complete Comprehensive Plan amendment, those requirements have been satisfied. As noted at the hearing on June 5, 2007, by counsel for Coeur d'Alene Land and Magnuson Properties, John F. Magnuson, Idaho Code §67-6509(b) does not require additional **public** hearings when and if the Board of County Commissioners makes a material change to the recommendation of the Planning & Zoning Commission. The plain language of §67-6509(b) only requires "further

notice and hearing" before the governing board adopts the amended plan.

In addition to the public hearing had by the Board of County Commissioners on September 14, 2006, (where, the Court has determined, a material change to the recommendation to the Planning & Zoning Commission was made), five additional hearings were had. It is undisputed that these hearings were properly noticed. A public hearing was had on September 25, 2006, *see Tr. Volume 1 of 1, pp. 106-201.* The Board of County Commissioners deliberated at a noticed hearing on September 28, 2006, *see Tr. Volume 1 of 1, pp. 204-209.* The Board of County Commissioners held another public hearing on October 4, 2006, *see Tr. Volume 1 of 1, pp. 211-227.* The Board of County Commissioners held a properly noticed hearing, deliberations, on October 5, 2006, *see Tr. Volume 1 of 1, pp. 229-234.* The Board of County Commissioners held yet another properly noticed hearing, deliberations, on November 9, 2006, *see Tr. Volume 1 of 1, pp. 236-239.*

Clearly, it cannot be argued that there were not additional hearings held after the September 14, 2006, public hearing.

III. CONCLUSION

The matter before the Court is an application for an amendment to the Comprehensive Land Use Map. Amendments to the Comprehensive Plan Land Use Map are not the same as a full Comprehensive Plan change and therefore should not be required to fully comply with Idaho Code §67-6509. The principle behind additional hearings on amendments to the Comprehensive Plan goes to the principle of due process wherein parties are entitled to notice and an

opportunity to be heard. The actions of the Board of County Commissioners did not result in a deprivation of any due process rights of any of the named petitioners, nor is it alleged that they were deprived of their opportunity to be heard on the issue. To the extent that full compliance with Idaho Code §67-6509 is required for an amendment to a portion of the Comprehensive Plan, to-wit: the Land Use Map, full compliance was had since there were public hearings on the same application had by the Planning & Zoning Commission and the Board of County Commissioners, plus five additional properly noticed hearings had by the Board of County Commissioners after their last full public hearing.

While the present matter does not clearly fit into the situations and rules covered by the Local Land Use Planning Act, it cannot honestly be debated that the actions of Kootenai County were anything less than an attempt at full compliance. To the extent that the lines between the Board of County Commissioners' duties acting as a quasi-legislative body, and its duties as a quasi-judicial body were blurred, those blurrings are as a result of the numerous duties and powers of the Board of County Commissioners and the lack of clear guidance under the Local Land Use Planning Act.

DATED this 12th day of June, 2007.

Kootenai County
Department of Legal Services

By _____
John A. Caffery
Attorney for Respondent
Kootenai County

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2007, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

[ ] U.S. Mail
[ ] HAND DELIVERED
[ ] OVERNIGHT MAIL
[✓] TELEFAX (FAX)

Hon. Charles W. Hosack
District Judge
Interoffice Delivery

Scott A. Reed
Attorney at Law
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By: John A. Cafferty
JOHN A. CAFFERTY

River Recharge Area, the Coeur d'Alene Lake Region, and the Coeur d'Alene River Basin Region.

The designation of Surface Water Resource Areas requires that special considerations be made in addition to the general land use designations of "Residential, Rural, Open Space/Limited Residential, Timber, and Agricultural Areas."

The Future Land Use Map

The Future Land Use Map is not an attempt to define exact boundaries, but instead is a general outline of areas of suitable projected land uses. There are no sharp breaks between designations. Rather, there is a transition. The transition between designations should be considered to be approximately 1/4-mile wide.

It should be understood that the map is intentionally general. Designations should be given to broad areas, not to individual sites. For most of the County, the minimum area to be considered for a separate designation should be approximately 1/2-square mile (320 acres). For areas within an adopted or proposed Area of City Impact, the minimum area for consideration should be smaller, approximately 1/4-square mile (160 acres). Because of the nature of the Map, pockets of different land uses may be hidden by the broad designation.

This Future Land Use Map shall not be construed or interpreted as presenting any challenge to any active existing land use. The Comprehensive Plan is a guide to future development without effect upon actual existing developments in use.

The goals and policies of this Plan shall be used as the guide for the Zoning Ordinance, which will be site specific, and will recognize existing and future pockets and give them appropriate zoning designations.

In addition to the designations listed above, the map depicts lands over which the County has no jurisdiction such as incorporated cities, Tribal Trust Land and public lands administered by Federal agencies. If the County should gain jurisdiction over any part of these areas, the designation should be considered to be the same as the predominant designation of the area. Also shown on the map are adopted Areas of City Impact over which the County maintains planning authority in cooperation with the affected cities. As Area of City Impact Agreements are completed between the County and each city, the adopted Impact Areas will be reflected on the Future Land Use Map. The terms of the Agreements shall determine what ordinances and standards apply within each adopted Impact Area.

(Refer to Future Land Use Map in Section D. Maps)

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EXHIBIT

tabbies

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STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED:

2007 JUN 13 PM 3:08

CLERK DISTRICT COURT
DEPUTY

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Attorneys for Intervenors Powderhorn Communities LLC and Heartland LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unicorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unicorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON,

Plaintiffs,

v.

KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants,

and

POWDERHORN COMMUNITIES LLC, and HEARTLAND LLC, and COEUR D'ALENE LAND COMPANY, and H.F. MAGNUSON,

Intervenors/Respondents.

NO. CV-06-8574

INTERVENORS POWDERHORN COMMUNITIES, LLC AND HEARTLAND LLC'S SUPPLEMENTAL BRIEF REGARDING IDAHO CODE § 67-6509

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INTERVENORS POWDERHORN COMMUNITIES LLC and HEARTLAND LLC (hereinafter "Powderhorn") file this supplemental memorandum addressing the Court's question of whether Kootenai County satisfied the notice and hearing requirements of Idaho Code § 67-6509.

QUESTION PRESENTED

Whether Kootenai County met the notice and hearing requirements of Idaho Code § 67-6509(b).

FACTUAL AND PROCEDURAL BACKGROUND

The Court is familiar with the factual and procedural background in this case. However, the following facts directly relate to the question presented:

1. On December 16, 2005, Powderhorn filed a Request for an Amendment to the Kootenai County Comprehensive Plan for the general geographic area known as the Powderhorn Peninsula. R. Vol. 2, p. 310 and R. Vol. 1, p. 57.

2. On April 27, 2006, the Kootenai County Planning Commission held a public hearing. Supp. Tr. Vol. 1, p. 1-89.

3. On May 26, 2006, the Planning Commission deliberated and found the property uses on the Peninsula had in fact changed and were no longer agricultural or timber; however, despite the admitted changes in land use on the Peninsula, the Commission recommended denial of the Application because it wanted to wait for the entire county-wide Comprehensive Plan rewrite. Tr. Vol. 1, p. 1-17.

4. On the evening of September 14, 2006, and into the very early morning hours of September 15, 2006, the Kootenai County Board of Commissioners conducted its first public hearing on Powderhorn's Application. Tr. Vol. 1, pp. 19-104.

5. The Commissioners did not deliberate at that time as the hearing had gone past midnight. Tr. Vol. 1, p. _____.

6. On September 25, 2006, the Commissioners conducted another public hearing with a site visit to the general area of the Powderhorn Peninsula. Tr. Vol. 1, p.106-201.

7. On September 28, 2006, pursuant to proper notice and publication, the Commissioners held another hearing. In order to cure any alleged defects regarding the site visit, the Commissioners voted to reopen public testimony and asked that a new public hearing, limited to the site visit, be set for October 4, 2006. Tr. Vol. 1, p. 204-209.

8. On October 4, 2006, pursuant to Commissioner Brodie's statement and her successful motion to reopen the record, the Commissioners held a third pubic hearing and more evidence was submitted in order to cure any alleged deficiencies with the site visit. Tr. Vol. 1, p 211-227.

9. On October 5, 2006, the Commissioners held a fourth hearing for Deliberations on the Powderhorn Application. R. Vol. 3, p. 618; Tr. Vol. 1. p. 229-234. During the October 5 hearing, the Board of Commissioners voted to approve the amendment to the Comprehensive Plan designation to Rural. R. Vol. 3, p. 618; Tr. Vol. 1, p. 232 and pp. 233 – 234.

10. On November 9, 2006, the Commissioners held a fifth hearing and signed the Order of Decision changing the Comprehensive Plan Future Land Use Map designation for the Powderhorn Peninsula from Agricultural to Rural. R. Vol. 3, pp. 604-614; Tr. Vol. 1, p. 238.

11. On November 15, 2006, Petitioners filed their first Petition for Judicial Review of the November 9, 2006, Decision. R. Vol. 2, pp.334-358.

12. On November 16, 2006, the Kootenai County Board of Commissioners held a sixth hearing and issued an Amended Order of Decision. The outcome of this Amended Decision was no different from the November 9, 2006 hearing and again approved the Comprehensive Plan redesignation to Rural. R. Vol. 3, pp. 591-600. Tr. Vol. 1, p. 244.

STANDARD OF REVIEW

> **The Court shall affirm the agency's action unless** the Court finds that the agency's findings, inferences, conclusions or decisions are: "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; and (e) arbitrary, capricious, or an abuse of discretion." I.C. § 67-5279(3). **The party attacking a zoning board's action must first illustrate that the board erred in a manner specified therein and must then show that a substantial right of the party has been prejudiced.**

Eacret v. Bonner County, 139 Idaho 780, 784, 86 P.3d 494, 498 (2004) (internal citations omitted) (emphasis added). Planning and zoning actions are entitled to a strong presumption of validity. *Sanders Orchard v. Gem County*, 137 Idaho 695, 698, 52 P.3d 840, 843 (2002).

LEGAL ARGUMENT AND AUTHORITIES

During the hearing on the merits on June 5, 2007, the Court raised a new issue *sua sponte*. The Court, for the first time, questioned whether Idaho Code § 67-6509 applied to this appeal. None of the parties raised or briefed this issue previously.

This brief addresses the question of whether the Kootenai County Board of Commissioners decision was made upon lawful procedure. The argument presented involves three elements:

(1) The Court lacks jurisdiction over Petitioners' claims under the Local Land Use Planning Act and Idaho Administration Procedures Act;

(2) The question of whether Idaho Code § 67-6509 was complied with was not raised in the proceeding below or raised by the Petitioners and should not be considered now;

(3) If the Court considers this issue:

(a) The notice and hearing requirements of Idaho Code § 67-6509 were complied with by Kootenai County;

(b) *Price v. Payette County* is inapplicable; and

(c) No substantial right of the Petitioners has been prejudiced.

1. THIS COURT LACKS JURISDICTION OVER PETITIONERS' CLAIMS.

Powderhorn's approved Comprehensive Plan Amendment is a legislative matter. The Application applied to the entire geographic area known as the Powderhorn Peninsula. Kootenai County Planner Mark Mussman admitted and documented that this Application was a "legislative matter" involving "numerous pieces of property." R. Vol. 1, p. 131 (emphasis added).

"Promulgation or enactment of general zoning plans and ordinances is a legislative action." *Burt v. City of Idaho Falls,* 105 Idaho 65, 665 P.2d 1075 (1983). "Action is legislative when it affects a large area consisting of many parcels of property in disparate ownership. Conversely, action is considered quasi-judicial when it applies a general rule to a specific interest, such as a zoning change affecting a single piece of property, a variance, or a conditional use permit." *Id.* at 68 n.4.; citing *Martin Cy. v. Yusem,* 690 So.2d 1288, 1292 (Fla. 1997).

In *Burt v. City of Idaho Falls,* the Supreme Court of Idaho specifically held that "the annexation of land, the subsequent **amendment of the comprehensive plan** and the zoning of the annexed land" **was a legislative function,** as opposed to quasi-judicial function. *Burt,* 105 Idaho at 68.[1] The Idaho Court further held that "**such [legislative] actions are not subject to direct judicial review.**" *Id.* "Legislative action is shielded from direct judicial review by its high visibility and widely felt impact, on the theory that an appropriate remedy can be had at the polls." *Id.*

In *Burt*, the Court expressly stated as follows:

[1] Because the subject land was being annexed into the City of Idaho Falls, it obviously involved "a specifically identifiable property." However simply because the comprehensive plan amendment dealt with "specifically identifiable land" it did not mean that the comprehensive plan amendment it somehow became a quasi-judicial decision. It did not, it remained a legislative decision.

> We hold that in the annexation of land, the subsequent **amendment of the comprehensive plan** and the zoning of the annexed land, I.C. § 67-6525, **the city council acted in a legislative manner**, *see Cooper, supra; Dawson, supra; Harrell, supra; see also City of Louisville v. District Court In and For County of Boulder*, 190 Colo. 33, 543 P.2d 67 (Colo.1975); *Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (Kan. 1978), **and that such actions are not subject to direct judicial review.** *See, e.g., Dawson, supra.* Costs awarded to defendants-respondents.

Burt v. Idaho Falls, 105 Idaho 65, 68, 665 P. 2d 1075 (1983).

Powderhorn's Comprehensive Plan amendment is legislative and is not subject to direct judicial review. Thus, the Court may not consider whether Idaho Code § 67-6509(b) was complied with in this appeal. This issue can only be addressed by way of a declaratory relief action.

2. THE QUESTION OF COMPLIANCE WITH IDAHO CODE § 67-6509 WAS NOT RAISED BEFORE THE BOARD OF COMMISSIONERS AND THIS COURT MUST NOT DECIDE ISSUES PRESENTED FOR THE FIRST TIME ON APPEAL.

Assuming *arguendo* this Court has jurisdiction, it still may not consider whether Idaho Code § 67-6509 was complied with because the issue was raised for the first time on appeal. It is a well established rule in Idaho that review on appeal is limited to those issues raised before the lower tribunal and that an appellate court will not decide issues presented for the first time on appeal. *Balser v. Kootenai County Bd. of Comm'rs*, 110 Idaho 37, 714 P.2d 6, 9 (1986); *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 460, 649 P.2d 1214, 1216 (1982); *Webster v. Potlatch Forest*, 68 Idaho 1, 16, 187 P.2d 527, 536 (1947). *See also Masters v. State*, 105 Idaho 197, 668 P.2d 73 (1983) (an appellant is held to the theories on which a cause was tried in the lower court and may not raise additional or new theories on appeal); *International*

Business Machines Corp. v. Lawhorn, 106 Idaho 194, 677 P.2d 507 (Ct.App.1984) (even if issue was arguably raised in the lower tribunal under liberal interpretation of pleadings, if not supported by any factual showing or by submission of legal authority, it was not presented for lower court's decision and would not be considered on appeal).

In *Balser v. Kootenai County Board of County Commissioners*, the Idaho Supreme Court held that this rule is equally applicable to appeals of zoning decisions. The Court held judicial review on appeal was limited to those issues raised before the Board of Commissioners and that a district court (acting in its appellate capacity) will not decide issues presented for the first time on appeal was made clear by Idaho Code § 67-6521(d) which states that judicial review of the board's decision is governed by Idaho Code § 67-5215(b)-(g) which confined the review by the district court to the record. Idaho Code § 67-5215(f) (repealed July 1, 1993). Obviously, if an issue has been raised before the governing board it will be part of the record (absent some clerical error).

No Idaho case has held that this rule is also applicable to appeals of Comprehensive Plan amendments (probably because the amendment of a Comprehensive Plan is legislative). Notwithstanding, this Court should apply the same rule on judicial review of the Comprehensive Plan amendment as it would over a zoning decision.

In this case, as in *Balser*, the Petitioners based their appeal on Idaho Code § 67-6521(d). Under Idaho Code § 67-6521(d), judicial review is governed by Chapter 52, Title 67, Idaho Code (the Idaho Administrative Procedures Act). The Idaho Administrative Procedures Act confines review to the agency record. Idaho Code § 67-5277. Thus, the review on appeal of a Comprehensive Plan amendment should be limited to those issues raised before the Board of Commissioners.

The Petitioners did not raise the issue of compliance with Idaho Code § 67-6509 and they certainly did not raise it before the Board of Commissioners. The district court's

observation at the hearing on June 5, 2007 that Petitioners have not addressed the issue regarding compliance with Idaho Code § 67-6509 is understandable considering the fact that the issue was not before the Board of Commissioners. Therefore, it is an error for this Court, sitting as an appellate court in an action filed under the IDAPA and LLUPA, to nevertheless address and decide the issue.

3(a). THE "PUBLIC HEARING" AND "HEARING" REQUIREMENTS OF IDAHO CODE § 67-6509 WERE SATISFIED.

Again, assuming *arguendo* the question of compliance with Idaho Code § 67-6509 is properly before this Court, the Board of Commissioners complied with its requirements. The resolution of this issue involves the interpretation of Idaho Code § 67-6509 and its application to the facts of this case.

Interpretation of a statute begins with an examination of the statute's literal words. *In re Permit No. 36-7200,* 121 Idaho 819, 823, 828 P.2d 848, 852 (1992); *Ada County v. Gibson,* 126 Idaho 854, 856, 893 P.2d 801, 803 (Ct. App. 1995). The Board of Commissioners' decision and interpretation of its own regulations is entitled to a presumption of correctness. *Proesch v. Canyon County Board of Commissioners*, 137 Idaho 118, 121, 44 P.3d 1173, 1176 (2002). If the language of the statute is unambiguous, "the clear expressed intent of the legislature must be given effect and there is no occasion for construction." *Ada County Assessor v. Roman Catholic Diocese,* 123 Idaho 425, 428, 849 P.2d 98, 101 (1993). *See also Wolfe v. Farm Bureau Ins. Co.,* 128 Idaho 398, 404, 913 P.2d 1168, 1174 (1996); *State v. Watts,* 131 Idaho 782, 784, 963 P.2d 1219, 1221 (Ct. App. 1998).

Idaho Code § 67-6509 states:

> (a) The planning or planning and zoning commission, prior to recommending the plan, amendment, or repeal of the plan to the governing board, shall conduct at least one (1) public hearing in which interested persons shall have an opportunity to be heard. At least fifteen (15) days prior to the hearing, notice of the time and place and a summary of the plan to be discussed shall be published in the official

newspaper or paper of general circulation within the jurisdiction. The commission shall also make available a notice to other papers, radio and television stations serving the jurisdiction for use as a public service announcement. Notice of intent to adopt, repeal or amend the plan shall be sent to all political subdivisions providing services within the planning jurisdiction, including school districts, at least fifteen (15) days prior to the public hearing scheduled by the commission. Following the commission hearing, if the commission recommends a material change to the proposed amendment to the plan which was considered at the hearing, it shall give notice of its proposed recommendation and conduct another public hearing concerning the matter if the governing board will not conduct a subsequent public hearing concerning the proposed amendment. If the governing board will conduct a subsequent public hearing, notice of the planning and zoning commission recommendation shall be included in the notice of public hearing provided by the governing board. A record of the hearings, findings made, and actions taken by the commission shall be maintained by the city or county.
(b) The governing board, as provided by local ordinance, prior to adoption, amendment, or repeal of the plan, may conduct at least one (1) public hearing, in addition to the public hearing(s) conducted by the commission, using the same notice and hearing procedures as the commission. The governing board shall not hold a public hearing, give notice of a proposed hearing, nor take action upon the plan, amendments, or repeal until recommendations have been received from the commission. Following consideration by the governing board, if the governing board makes a material change in the recommendation or alternative options contained in the recommendation by the commission concerning adoption, amendment or repeal of a plan, further notice and hearing shall be provided before the governing board adopts, amends or repeals the plan.
(c) No plan shall be effective unless adopted by resolution by the governing board. A resolution enacting or amending a plan or part of a plan may be adopted, amended, or repealed by definitive reference to the specific plan document. A copy of the adopted or amended plan shall accompany each adopting resolution and shall be kept on file with the city clerk or county clerk.
(d) Any person may petition the commission or, in absence of a commission, the governing board, for a plan amendment at any time. The commission may recommend amendments to the land use map component of the comprehensive plan to the governing board not more frequently than once every six (6) months. The commission may recommend amendments to the text of the comprehensive plan and to other ordinances authorized by this chapter to the governing board at any time.

Section (a) provides that the Planning and Zoning Commission must have a public hearing prior to making a recommendation on an amendment to the Comprehensive Plan. This

occurred when the Planning Commission held its public hearing on May 26, 2006. Thereafter, the Board of Commissioners held an additional six public hearing and hearings before adopting, amending, or repealing the Comprehensive Plan future land use designation for the Peninsula.

The first sentence of Section (b) provides that the Board of Commissioners must also hold a "public hearing" prior to adopting an amendment to the Comprehensive Plan. The second sentence of Section (b) prohibits the Board of Commissioners from holding any "public hearings" until all of the recommendations from the Planning and Zoning Commission have been received by the Board of Commissioners. The third sentence of Section (b) provides that if the Board of Commissioners make a material change in the recommendation of the Planning and Zoning Commission, then it must hold yet another "hearing" before it adopts, amends or repeals the plan.

In this case, the Board of Commissioners held a "public hearing" after receiving all of the recommendations of the Planning and Zoning Commission. This public meeting was held on September 14-15, 2006. Thereafter, the Board of Commissioners held hearings on September 26, 2006, October 4, 2006 and October 5, 2006 prior to voting to allow the amendment of the Comprehensive Plan.

On October 5, the Board of Commissioners voted to approve the Application. To the extent this vote of approval constitutes "a material change in the recommendation," which is debatable, then consistent with Idaho Code § 67-6509, then the County issued further notice and hearings were conducted on November 9 and November 16, before the Board of Commissioners "amended, adopted, or repealed" the plan. Because the Planning Commission admitted that the land uses had in fact changed on the Peninsula and had ceased timber and agricultural production, it is debatable whether any "material change in the recommendation occurred." The Planning Commission simply wanted to wait or delay a decision until the entire

County Comprehensive Plan rewrite was finished. A delay in time may not necessarily constitute a "material change in the recommendation." Nonetheless, by holding additional hearings after voting to approve the Application, the County fully complied with Idaho Code § 67-6509.

3(b). *PRICE V. PAYETTE COUNTY BOARD OF COMMISSIONERS* IS INAPPLICABLE.

In *Price v. Payette County Board of Commissioners*, the Idaho Supreme Court addressed this issue a case deceptively similar to this one. 131 Idaho 426, 958 P.2d 583 (1998). In *Price*, Bone owned 80 acres of land in Payette County which were zoned "prime agricultural." Bone filed a petition with the Payette County Planning and Zoning Commission requesting that the Comprehensive Plan be amended to allow his property to be rezoned from an agricultural zone to a residential zone for the purpose of subdividing the property into residential lots. Two couples, Edward and Elizabeth Price, and Jerry and Louise Brown, each owned 80 acres adjacent to Bone's property. Both the Prices and the Browns (hereinafter referred to collectively as "Price") used their property for agricultural activities and were opposed to Bone's request for a zone change. The Planning and Zoning Commission held several public hearings on the issue of Bone's request, and ultimately notified the Board of Commissioners by letter that the Planning and Zoning Commission had voted to forward an unfavorable recommendation.

After holding a public hearing, the Board of Commissioners simultaneously granted Bone's application for a zone change and an amendment to the Comprehensive Plan. The Board of Commissioners entered its findings of fact, and passed an ordinance rezoning Bone's property. Price submitted a motion to reconsider, which was denied by the Board of Commissioners.

Price then appealed to the district court. The district court affirmed the Board of Commissioner's decision in part and remanded the case for further proceedings. The remand was limited to a requirement for a second hearing by the Board of Commissioners on the decision to amend the Comprehensive Plan. The Board of Commissioners held the second public hearing as required by the district court's order. Both parties appealed the district court decision.

On cross-appeal, the Board of Commissioners asserted the district court erred in requiring the Board of Commissioners to hold a second hearing on its decision to amend the Comprehensive Plan *in conjunction with the rezone*. The district court, acting in its appellate capacity, considered whether the Board of Commissioners violated Idaho Code § 67-6509(b) by failing to hold a second hearing prior to its adoption of the amendment to the Comprehensive Plan. The Court found that if the Board of Commissioners, after a public hearing on a request to amend the Comprehensive Plan, makes **"a material change in the plan,"** then the Board of Commissioners must provide notice of, and conduct, a second hearing before the Board of Commissioners adopts the amendment. (Emphasis added). Because the Comprehensive Plan stated as one of its goals the avoidance of residential development upon prime agricultural lands, an amendment to the Comprehensive Plan which rezones agricultural property as residential property constitutes a material change for the purpose of Idaho Code § 67-6509(b).

Thus, the Court held that the Board of Commissioners should have held a second public hearing before it adopted the amendment to the Comprehensive Plan. The Idaho Supreme Court set aside the amendment to the Comprehensive Plan because it was in violation of Idaho Code § 67-6509(b) and remanded the case for a new set of hearings on the Comprehensive Plan amendment.

In this case, there is no zone change application at issue. This is why *Price* is deceptively attractive to the Court. Unlike *Price*, where a quasi-judicial action (i.e., a zone change) occurred simultaneously with a legislative action (i.e., an amendment to the Comprehensive Plan), this Court does not have jurisdiction under IDAPA or LLUPA. Here, act of the Board of Comissioners in amending the Comprehensive Plan was purely legislative.

Moreover, the Board of Commissioners did not make a "material change in the plan." The Planning and Zoning Commission recommended denial of the amendment to the Comprehensive Plan (the same as in *Price*). Under *Price*, if denial of the Planning and Zoning Commission's recommendation is **"a material change in the plan"**, then the Board of Commissioners must have a second hearing. In this case, Kootenai County Board of Commissioners made no "material change in the plan." The County's Comprehensive Plan is a document nearly 8 inches thick. It is several hundred pages. The Powderhorn Comprehensive Plan application changed only one page, the future land use map. As Petitioners themselves asserted repeatedly, the Powderhorn Application involved only a fraction of a percentage of the land covered by the Comprehensive Plan. The Powderhorn Application did not materially change any of the voluminous goals, policies, or objectives in the scope of the overall Comprehensive Plan. Thus, under the Court's reading of *Price*, no "material change in the plan" occurred. Even if a so called "material change in the recommendation" occurred under 67-6509, then sufficient "public hearings" and "hearings" were held then prior to adopting, amending, or repealing the plan. Thus, to the extent they even apply, the requirements of Idaho Code § 67-6509 and *Price* were satisfied.

3(c). EVEN IF THE PUBLIC HEARING REQUIREMENTS WERE NOT SATISFIED, PETITIONERS HAVE NOT SHOWN ANY INJURY TO A SUBSTANTIAL RIGHT.

Even if the appropriate procedure was not followed, the Petitioners must show an additional injury to a substantial right. *See Eacret,* 139 Idaho at 784, 86 P. 3d at 498, See *Sanders,* 137 Idaho at 698, 52 P. 3d at 843, *Price*, 131 Idaho at 429, 958 P.2d at 589. There has been no injury to a substantial right of any Petitioner in this case. The Petitioners have had ample opportunity to voice opposition to the amendment of the Comprehensive Plan. The Planning and Zoning Commission held a public hearing, the Board of Commissioners held six public hearings and/or hearings. Multiple times, Petitioners were given notice and the opportunity to raise any and all objections prior to the Board adopting the amendment. Moreover, the Board of Commissioners allowed additional public testimony on the purported issue of *ex parte* contact. At no time have any of these Petitioners (none of whom even own land on the Peninsula) alleged or shown any injury to their substantial rights as a result of the County's six or seven hearings on this Application.

It is also important to point out that this is only an amendment to the Comprehensive Plan. Powderhorn still must go through the process of obtaining a zone change and multiple other approvals from various governmental entities. As the Court in *Price* stated, the Board of Commissioners must deliberate first on the proposed amendment to the Comprehensive Plan. The Comprehensive Plan Amendment occurred in November 2006, however nothing more has occurred. Because of Petitioners' Motion and this Court's December 9, 2006 stay, nothing has progressed on the zone change. No public hearings on the zone change have been held. However, when they are, then Petitioners will have yet another opportunity to object and raise issues in the public hearing context. Therefore, the present Powderhorn case is completely unlike *Price*, in that Powderhorn has not been allowed its zone change hearings. Those public

hearings have been barred. The Petitioners still have ample opportunity to voice their zone change concerns to the Board of Commissioners.

CONCLUSION

For the reasons stated above, the Court should not consider this new issue raised at the hearing on June 5, 2007, and, even if it considers this issue, find that there was no violation of Idaho Code § 67-6509(b). The Board of Commissioners' decision should be upheld.

DATED this 13th day of June, 2007.

LUKINS & ANNIS, P.S.

By _____
MISCHELLE R. FULGHAM, ISB #4623
PETER J. SMITH IV, ISB #6997
Attorneys for Intervenors Powderhorn Communities LLC and Heartland LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of June, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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Attorney for Intervenors Coeur d'Alene Land Company and H. F. Magnuson

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON,

Plaintiffs/Petitioners,

vs.

KOOTENAI COUNTY, a political subdivision of the State of Idaho acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants/Respondents,

NO. CV-06-8574

POST-HEARING OPENING SUPPLEMENTAL MEMORANDUM OF AUTHORITIES SUBMITTED ON BEHALF OF INTERVENORS COEUR D'ALENE LAND COMPANY AND H. F. MAGNUSON

and

POWDERHORN COMMUNITIES, LLC, HEARTLAND, LLC, COEUR D'ALENE LAND COMPANY, and H. F. MAGNUSON,

Intervenors/Respondents.

COME NOW Intervenors Coeur d'Alene Land Company and H. F. Magnuson, by and through their counsel of record, John F. Magnuson, pursuant to the Court's directives at the conclusion of the June 5, 2007 hearing convened for purposes of arguing Petitioners' substantive appeal, and submit this opening Memorandum of supplemental authorities and argument.

I. PROCEDURAL BACKGROUND

On May 31, 2007, the parties appeared before the Court to advance argument on Petitioners' Alternative Motion to Amend. Said Motion sought leave of Court for purposes of allowing Petitioners to file an Amended Petition for Review which differed from the initial Petition for Review in two respects. First, the Amended Petition sought review of the County Commissioners' November 16, 2006 Order in addition to the November 9, 2006 Order identified in the Petitioners' initial Petition for Review. Second, the Motion sought permission to add a claim under the Uniform Declaratory Judgments Act, I.C. § 10-1201 *et seq.*, in addition to the appellate claims for review that Petitioners had advanced under the Local Land Use Planning Act and the Idaho Administrative Procedures Act.

Prior to the June 5, 2007 hearing, and as a result of the May 31, 2007 hearing, the Court orally determined that Petitioners would be allowed to amend their Petition for Review to encompass

both the November 16, 2006 Order and the November 9, 2006 Order. The Court reserved ruling on the issue of whether or not to allow Petitioners to amend their Petition for Review (advanced under the Local Land Use Planning Act and the Idaho Administrative Procedures Act) to include a claim at law, to-wit, a claim for declaratory relief. That issue remains pending.

Against the foregoing background, the parties appeared before the Court on June 5, 2007 for purposes of presenting argument related to the substantive merits (or lack thereof) of the administrative appeal that Petitioners had filed from the County's November 9, 2006 and November 16, 2006 Orders.

II. ADDITIONAL ARGUMENT.

A. The Court Lacks Jurisdiction over Plaintiffs' Claims Under the LLUPA and IDAPA.

At this juncture, the only claims before this Court are the Petitioners' claims for appellate review. Any claim for declaratory relief has not yet been added. Focusing solely on the appellate claim, the jurisdictional bases alleged by Petitioners are I.C. § 67-6521 (the Local Land Use Planning Act) and §§ 67-5270-67-5277 (the Idaho Administrative Procedure Act). Under the procedural and factual background at bar, neither Act confers jurisdiction on this Court.

The LLUPA makes clear that one who claims to be aggrieved by a county's adoption of a resolution to amend a portion of a Comprehensive Plan may not seek direct judicial appellate review. Idaho Code § 67-6521 provides for direct judicial review, but that right to review is limited to determinations related to "the issuance or denial of a permit authorizing . . . development." See I.C. § 67-6521(1)(a). There has been no decision by the County either issuing or denying a permit so as to allow development on any of the property encompassed by the amendment adopted by the Initial

Order or the Final Order. In fact, any such further action has been stayed by this Court.

In this regard, this case is readily distinguishable from Price v. Payette County, 131 Idaho 426, 958 P.2d 583 (1998), a case raised by the Court at the June 5, 2007 oral argument. In Price, Payette County simultaneously amended its Comprehensive Plan and entered an order rezoning the requesting party's property. Accordingly, in Price, there was an actual order before the Court that related to "the issuance . . . of a permit authorizing . . . development." See I.C. § 67-6521(1)(a). There is no such order in this case. Instead, this case represents a pure appeal from a legislative determination of the County. This case is virtually indistinguishable from Burt v. City of Idaho Falls, 105 Idaho 65, 665 P.2d 1073 (1983), which clearly held that an amendment to a Comprehensive Plan (which pertained to sixty-nine acres) was legislative. The only method for attacking such a legislative determination was through a claim for declaratory relief under a heightened burden of proof that requires an aggrieved party to show that the challenge resolution is clearly "confiscatory, arbitrary, unreasonable, or capricious." Burt v. City of Idaho Falls, 105 Idaho at 66. Moreover, the Burt court made clear that it was inappropriate to join such a claim for declaratory relief into an administrative appeal. The court authorized attaches under the Declaratory Judgments Act, utilizing the heightened burden previously described, in "collateral actions." Id.

B. Idaho Code § 67-6509(b) Does Not Serve as A Basis to Vacate the County's Orders.

1. The Issue Was Not Preserved by Petitioners for Purposes of Appellate Review.

At the June 5, 2007 hearing, the Court unilaterally raised an issue as to the potential applicability of the terms of Idaho Code § 67-6509(b). The issue had never before been raised by

Petitioners, either through briefing or argument. Moreover, at no point in time during these proceedings had Petitioners claimed that there was any inadequacy in the number of public hearings conducted below. Rather, the Petitioners specifically argued that the Board's decision was not supported by substantial evidence and that the alleged actions attributed to Planner Wichman and Commissioner Brodie should serve as some independent basis to vitiate the Orders. At no point in time was any argument advanced by the Petitioners as to any applicability of I.C. § 67-6509(b). Accordingly, the argument has been waived and is an inappropriate basis for the Court to rely upon in any determination on appeal. In State v. Hadley, 122 Idaho 728, 838 P.2d 331 (1992), the Court of Appeals held that an appellant's failure to raise a statutory issue "below is a waiver of the right to raise the issue on appeal." State v. Hadley, 122 Idaho at 731 (citing Whitehawk v. State, 119 Idaho 168, 804 P.2d 341 (Ct. App. 1991)). In this case, the Petitioners not only failed to raise the issue before the County, so as to allow for correction in the event the statutory section actually applied, they also failed to raise it on appeal to this Court. Accordingly, the argument has been waived.

2. The Second Public Hearing Required by § 67-6509(b) Does Not Apply Here.

In Price v. Payette County, supra, the case raised at oral argument by the Court, a request was made by a property owner (Bone) to amend Payette County's Comprehensive Plan to re-designate property zoned "prime agricultural" to "residential." The Payette County Planning and Zoning Commission recommended that Bone's request be denied. The County Commissioners, after conducting a public hearing, entered an order approving the amendment to the subject Comprehensive Plan.

Unlike here, the appellant in Price v. Payette County specifically raised the issue both on appeal and below. Such is not the case here. Moreover, under the facts previously described, the Supreme Court held that the Board was obligated to conduct a second public hearing because the proposed amendment to Payette County's Comprehensive Plan "constituted a material change" to the Comprehensive Plan. Price v. Payette County, 131 Idaho at 430. In other words, the "material change" which gives rise under § 67-6509(b) to the second public hearing is a material change to the Comprehensive Plan itself. Based upon Petitioners' own argument, there is no such material change that would result from the Comprehensive Plan land use map amendment currently before the Court.

In its Reply Brief filed May 30, 2007, the Petitioners acknowledge that the Comprehensive Plan land use map amendment at issue only affects "a tiny part of [the] County." Without conceding the accuracy of Petitioners' mathematical calculations, it is noteworthy that Petitioners nonetheless represent that the requested Comprehensive Plan amendment "seeks to change . . . only an infinitesimal .005% (one-half of one percent) of the total Kootenai County acreage." See Petitioners' Reply Brief (filed May 30, 2007) at p. 8.

Petitioners themselves have conceded that the requested Comprehensive Plan amendment does not constitute "a material change in the Plan," to use the phrasing of the Supreme Court in Price v. Payette County, 131 Idaho at 430. In fact, having advanced the argument that the requested Amendment is "infinitesimile" in scope, the Petitioners would be hard-pressed to argue that the subject Orders created a material change. It should not then be surprising that the Petitioners themselves never advanced an argument that a second hearing would be required under § 67-6509(b)

given their characterization of the requested change. Simply put, the holding in Price v. Payette County is inapplicable.

For the reasons separately set forth in the Supplemental Memoranda filed by the Powderhorn Intervenors and Kootenai County, substantial compliance was had with the alleged requirement that two public hearings be held by the Board prior to amending the Comprehensive Plan land use map. This is not to concede that two hearings were required. As noted above, there was no substantial amendment to the Comprehensive Plan and the Petitioners admit as much. However, if two public hearings were required, the transcript of proceedings indicates that the subject Amendment was addressed at public hearings held September 14, 2006 and October 4, 2006, as well as deliberations separately held on four (4) separate dates, all in public session (September 28, 2006, October 5, 2006, November 9, 2006, and November 16, 2006).

3. There Are No Public Notice Issues.

Inquiry was had by the Court as to whether or not compliance was had with any applicable public notice provisions. For the reasons previously advanced in detail by these Intervenors, including those reasons set forth in their Response Brief (filed May 4, 2007) and at the hearings held May 31 and June 5, 2007, the action of the Board in adopting a resolution to amend the Comprehensive Plan land use map was legislative. As a legislative matter, there is no public notice requirement other than as provided in § 67-6509(b). Those requirements were satisfied based upon the reasons set forth above.

C. The Court Should Dismiss the Administrative Appeal on Jurisdictional Grounds and Deny the Motion to Amend (With Respect to the Declaratory Judgment Claim (Without Prejudice).

Should the Court dismiss the pending appeal on jurisdictional grounds, as appears to be merited, then the Court must still address the pending Motion to add a declaratory judgment claim. That Motion should be denied without prejudice.

The Burt case makes clear that such a claim for declaratory judgment may be asserted. However, the Court also made clear that the claim should be asserted in a "collateral" fashion. Such a result makes practical sense. Specifically, consider the following. If the declaratory claim is allowed by way of an amended Complaint, then the present parties to this action will be entitled to answer. One of the defenses these Intervenors will raise is the Petitioners' failure to join necessary and indispensable parties. Specifically, other individuals who own property within the area subject to the Comprehensive Plan land use map amendment have rights in these proceedings that may be adversely affected by the Petitioners' claims. Those parties are entitled to move the Court, in the context of a declaratory judgment action, for entry of an order to intervene so as to protect their own interests. The undersigned represents no one other than Coeur d'Alene Land Company and H. F. Magnuson. Moreover, the undersigned has no authority to represent the interests of any other parties to this proceeding.

If the Court finds that Petitioners, through the addition of a declaratory judgment claim, have failed to join necessary or indispensable parties, then service will be required on such parties. That proceeding, unlike this one, will undoubtedly proceed under the Idaho Rules of Civil Procedure in toto. Those rules will include the additional parties' rights to invoke whatever remedies or relief they deem appropriate, including those rights available under Civil Rule 41 and all rules applicable to discovery.

Perhaps more significantly, the practical ramifications of a consolidation of this proceeding (an administrative appeal) with a declaratory judgment claim (an action at law) are troubling. This Court previously enjoined the Intervenors from pursuing their requested re-zone in accordance with the terms of the Comprehensive Plan land use map amendment. This stay was entered based upon the observation that this appeal would last no more than ninety (90) days and without any security being posted by Petitioners. If this action is joined with a declaratory judgment claim, and if the administrative appeal is dismissed on jurisdictional grounds, there will be no incentive or duty on the part of Petitioners to immediately appeal the issue to the Supreme Court. Where will this leave the Intervenors and other affected property owners? It will leave them in a position of extreme prejudice, incurring the continued carrying costs associated with the subject properties, without the concomitant posting of any required security by the Petitioners. In essence, it will create a free pass for the Petitioners.

There is virtually no harm to the Petitioners by requiring that they pursue any declaratory judgment action in a separate proceeding. Such separate proceedings will allow for a more expeditious appellate review of the determinations of this Court in the administrative appeal context, which could in fact potentially moot (or at least have a significant bearing upon) the issues in the declaratory judgment action. Any other result would simply make no practical or logistical sense.

III. CONCLUSION.

Based upon the reasons and authorities set forth above, these Intervenors request that the Court:

(1) Dismiss Petitioners' administrative appeal as lacking in jurisdiction; and

(2) Deny without prejudice, the Petitioners' Motion to Amend to add a declaratory judgment claim.

Dated this 13th day of June, 2007.

JOHN F. MAGNUSON
Attorney for Intervenors Coeur d'Alene Land Co.
and Harry F. Magnuson

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served upon the following, **via facsimile and U.S. Mail, postage prepaid** this 13th day of June, 2007:

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STATE OF IDAHO } SS
COUNTY OF KOOTENAI
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Attorney for Defendants/Respondents

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit, unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON,

Plainitffs/Petitioners,

vs.

KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants/Respondents.

Case No. CV-06-8574

KOOTENAI COUNTY'S RESPONSE TO SUBMISSION OF SUPPLEMENTAL BRIEFING

and,

HEARTLAND LLC and POWDERHORN COMMUNITIES, LLC, and COEUR D'ALENE LAND COMPANY and H.F. MAGNUSON,

Intervenors.

COMES NOW, the Respondent, Kootenai County, by and through its attorney of record, John A. Cafferty, Kootenai County Department of Legal Services, and in response to the submission of supplemental briefing by the parties, respectfully requests that this Honorable Court rely on the briefing and authorities previously submitted by counsel and deem this matter fully submitted and ripe for decision.

DATED this 19th day of June, 2007.

Kootenai County
Department of Legal Services

By _____
John A. Cafferty
Attorney for Respondent
Kootenai County

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June, 2007, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unicorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unicorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON,

Plaintiffs,

v.

KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants,

and

POWDERHORN COMMUNITIES LLC, and HEARTLAND LLC, and COEUR D'ALENE LAND COMPANY, and H.F. MAGNUSON,

Intervenors/Respondents.

NO. CV-06-8574

INTERVENORS POWDERHORN COMMUNITIES LLC, AND HEARTLAND LLC RESPONSE TO POST HEARING BRIEF OF PLAINTIFFS/PETITIONERS

INTERVENORS POWDERHORN COMMUNITIES LLC and HEARTLAND LLC (hereinafter "Powderhorn") file this response to Petitioners' "Post Hearing Brief."

I. INTRODUCTION

The Petitioners' Post Hearing Brief is a mischaracterization of the record and law. The Petitioners attempt to characterize this case as a zoning case. This is not a zoning case. The Board of Commissioners did not change any zoning classifications. They amended the Comprehensive Plan. This is evident from the fact that Powderhorn's subsequent request to change the zoning of its property was stayed by this Court pending the outcome of this appeal.

II. ARGUMENT

A. This Court lacks jurisdiction over this appeal.

Powderhorn's approved Comprehensive Plan amendment is a legislative matter. The Application applied to the entire geographic area known as the Powderhorn Peninsula. Kootenai County Planner Mark Mussman admitted and documented that this Application was a "legislative matter" involving "numerous pieces of property." R. Vol. 1, p. 131 (emphasis added).

"Promulgation or enactment of general zoning plans and ordinances is a legislative action." *Burt v. City of Idaho Falls,* 105 Idaho 65, 665 P.2d 1075 (1983). "Action is legislative when it affects a large area consisting of many parcels of property in disparate ownership. Conversely, action is considered quasi-judicial when it applies a general rule to a specific interest, such as a zoning change affecting a single piece of property, a variance, or a conditional use permit." *Id.* at 68 n.4.; citing *Martin Cy. v. Yusem,* 690 So.2d 1288, 1292 (Fla. 1997).

In *Burt v. City of Idaho Falls,* the Supreme Court of Idaho specifically held that "the annexation of land, the subsequent **amendment of the comprehensive plan** and the zoning of the annexed land" **was a legislative function,** as opposed to quasi-judicial function. *Burt*, 105 Idaho at 68.[1] The Idaho Court further held that "**such [legislative] actions are not subject to direct judicial review.**" *Id.* "Legislative action is shielded from direct judicial review by its high visibility and widely felt impact, on the theory that an appropriate remedy can be had at the polls." *Id.*

In *Burt*, the Court expressly stated as follows:

> We hold that in the annexation of land, the subsequent **amendment of the comprehensive plan** and the zoning of the annexed land, I.C. § 67-6525, **the city council acted in a legislative manner**, *see Cooper, supra; Dawson, supra; Harrell, supra; see also City of Louisville v. District Court In and For County of Boulder*, 190 Colo. 33, 543 P.2d 67 (Colo.1975); *Golden v. City of Overland Park*, 224 Kan. 591, 584 P.2d 130 (Kan. 1978), **and that such actions are not subject to direct judicial review.** *See, e.g., Dawson, supra.* Costs awarded to defendants-respondents.

Burt v. Idaho Falls, 105 Idaho 65, 68, 665 P. 2d 1075 (1983).

Powderhorn's Comprehensive Plan amendment is legislative and is not subject to direct judicial review. Thus, the Court may not consider whether the issues raised in this appeal. The issues can only be addressed by way of a declaratory relief action.

B. Powderhorn did not seek nor obtain an amendment to the zoning classifications within the Powderhorn Peninsula.

The Petitioners assert that Board of Commissioners made changes to the zoning of property located on the Powderhorn Peninsula. This statement is completely wrong.

[1] Because the subject land was being annexed into the City of Idaho Falls, it obviously involved "a specifically identifiable property." However simply because the comprehensive plan amendment dealt with "specifically identifiable land" it did not mean that the comprehensive plan amendment it somehow became a quasi-judicial decision. It did not, it remained a legislative decision.

Powderhorn did not seek to change the zoning of the Powderhorn Peninsula. Powderhorn sought and obtained an amendment to the Comprehensive Plan.

Prior to the Comprehensive Plan amendment, the entire peninsula was designated Agricultural, except for a small portion of land designated Federal and a small portion of land designated Timber. The Comprehensive Plan Future Land Use Map attached hereto as Exhibit "A" shows the Powderhorn Peninsula prior to the Comprehensive Plan Amendment. *See also* Agency Record, Case No. 05-080, Vol. 1, Pg. 27. **It must be made clear that the Comprehensive Plan Future Land Use Map is not a zoning map.** The Agricultural, Federal, and Timber designations are not zoning classifications. They are Comprehensive Plan land use designations.[2]

The decision on appeal is the approval of Powderhorn's petition for an amendment to the Comprehensive Plan Future Land Use Map. The Board of Commissioners did not approve any zone changes. Agency Record, Case No. CP-080-05, Vol. 3, pgs. 590-600.

The Petitioners also assert that various property owners, none of whom are parties to this appeal or members of the associations who are parties to this appeal, are victims of a regulatory taking caused by the amendment to the Comprehensive Plan. This argument clearly fails. The Comprehensive Plan amendment changed the Agricultural, Timber and Federal Comprehensive Plan designations to Rural. The Rural designation is a more "liberal" designation than the Agricultural designation. A taking is a deprivation of a property right. Idaho Code § 67-8002(4). In this case, the amendment to the Comprehensive Plan does just the opposite. Also, contrary to the assertions of the Petitioners, the amendment to the Comprehensive Plan did not change in the minimum lot size or add other restrictions to

[2] Exhibit "3" to the Petitioners' Post Hearing Brief is a copy of the Kootenai County zoning map. The area in green is **zoned** Agricultural. The area shown in yellow is **zoned** Restrictive Residential.

property. As a result, the assertion by the Petitioners that the amendment resulted in a regulatory taking is unfounded.

It is worth pointing out that the Petitioners repeatedly assert that the amendment to the Comprehensive Plan changed the zoning of all property on the Powderhorn Peninsula to "Rural Residential." It did not for the reasons already stated. Moreover, there is no zoning classification called "Rural Residential." "Rural Residential" is a Comprehensive Plan land use designation, not a zoning land use designation. *See* Agency Record, Case No. 05-080, Vol. 1, Pg. 27.

Finally, it is simply disingenuous for Petitioners to argue that a zone change was completed by the amendment to the Comprehensive Plan given the fact that the Petitioners sought and succeeded in obtaining a stay of all hearings on Powderhorn's request for a zone change of its property.

C. Kootenai County was not required to comply with the notice requirements of Idaho Code § 67-6511 because those requirements apply only to zone changes.

The Petitioners argue that Kootenai County failed to provide proper notice of the Comprehensive Plan amendment to property owners. This is based on the argument that the Comprehensive Plan amendment was actually a zone change.

The notice requirements for zoning change are governed by Idaho Code § 67-6511. *McCuskey v. Canyon County*, 123 Idaho 657, 851 P.2d 953 (1993). According to Idaho Code § 67-6511, prior to a zone change notice must be served by mail on all property owners within the land being rezoned and all property owners within three hundred (300) feet of the external boundaries of the land being rezoned. Idaho Code § 67-6511.

The Petitioners argument that the zone change notice requirements apply here is without merit. Idaho Code 67-6511 unambiguously applies to the creation, amendment, or repeal of "zones or zoning districts" – not comprehensive plans. This is made clear in the first paragraph of Idaho Code § 67-6511, which states, in part, that "The zoning districts shall be in accordance with the policies set forth in the **adopted comprehensive plan**." Idaho Code § 67-6511 (emphasis added). The statute continues: "**After considering the comprehensive plan** and other evidence gathered through the public hearing process, the zoning or planning and zoning commission may recommend and the governing board may adopt or reject an ordinance amendment pursuant to the notice and hearing procedures provided in section 67-6509, Idaho Code..." Idaho Code § 67-6511(b) (emphasis added); *see also McCuskey v. Canyon County*, 123 Idaho 657, 662, P.2d 953, ____ (1993) (stating Idaho Code § 67-6511(b) "applies when a zoning ordinance is being amended."). This provision applies only to amendments of the zoning ordinance, not amendments to the Comprehensive Plan.

The Petitioners also cite to two zoning cases in support of the proposition that Kootenai County failed to provide proper notice of the proposed Comprehensive Plan amendment. Both of these cases are distinguishable and inapplicable to this case because both dealt with zone changes, not amendments to Comprehensive Plans.[3] The Petitioners' reliance upon these two cases is in error.

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[3] In *McCuskey*, the dispute concerned how a particular parcel of property was zoned. 123 Idaho 657, 658-59, 851 P.2d 953, ____ (1993). McCuskey claimed that a particular zoning ordinance was adopted in violation of due process requirements. 123 Idaho at 659, 851 P.2d at _____. The Court agreed. *Id.* at 663, 851 P.2d at _____. The Court held that a zoning ordinance enacted without complying with the state enabling statutes is ineffectual. *Id.* It is clear that *McCuskey* did not deal with an amendment to the Comprehensive Plan. Accordingly, the Petitioners err in relying upon *McCuskey* for the proposition that the Comprehensive Plan amendment was adopted in violation of Idaho Code § 67-6511(b).

The Petitioners state that Idaho Supreme Court "declared that an amendment to the Comprehensive Plan under Idaho Code § 67-6509(a) and (b) was invalid" in *Jerome County v. Holloway*. 118 Idaho 681, 799 P.2d 269 (1990). This statement is erroneous. *Jerome County* did not involve an amendment to a comprehensive plan. In *Jerome County*, a zoning ordinance was adopted in December of 1984. *Jerome County*, 118 Idaho at 681, 799 P.2d at 296. Subsequently, the County Commissioners held a public hearing to get public reaction to the new

Lastly, at the hearing on June 5, 2007, the Court asked Civil Attorney John Cafferty if personal notice had been served on each of the land owners. The Petitioners place great emphasis on the fact that Mr. Cafferty stated that notice by publication was proper because more than two hundred (200) owners were within three hundred (300) feet of the exterior boundaries of the Powderhorn properties. Thus, even if the zone change notice requirements applied, such notice requirements were satisfied.

Regardless of Mr. Cafferty's statements, the fact remains that this is not zone change case. The requirements of Idaho Code § 67-6511 do not apply, and, as explained below, Kootenai County complied with the notice requirements for an amendment to the Comprehensive Plan.

D. The notice requirements for a Comprehensive Plan amendment were satisfied.

The Petitioners have not argued and, thus, concede that Kootenai County complied with the notice requirements of Idaho Code § 67-6509.[4] This is probably because the agency record contains numerous affidavits of publication of meeting notices of the planning commission and of the Board of Commissioners regarding the Comprehensive Plan amendment. Agency Record, Case No. CP-080-05, Vol. 1, pgs. 100, 231-33; Vol. 2, pgs. 263, 270-71, 284. Thus, the Court must conclude that the notices comply with Idaho Code § 67-6509.[5]

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ordinance. *Id.* at 682, 799 P.2d at ___. After the hearing on the ordinance, the County Commissioners published a notice of hearing to consider proposed amendments to the zoning ordinance, but the notice of hearing did not include the proposed amendments. *Id.* Thereafter, an amended notice was published; however, it was not published 15 days prior to the hearing. *Id.* The amendments were adopted about a month later. *Id.* The Idaho Supreme Court held that the zoning amendments were invalid due to the failure to provide notice of the proposed amendments at least 15 days prior to the hearing under Idaho Code § 67-6509. *Id.* at 684, 799 P.2d at ____.

[4] The Petitioners have asserted that the hearing requirements of Idaho Code § 67-6509(b) were not complied with.

[5] According to Idaho Code § 67-6509, at least fifteen (15) days prior to the hearing on the Amendment, notice of the time and place and a summary of the amendment to be discussed must be published in the official newspaper for paper of general circulation. Idaho Code § 67-6509.

E. The published notices and posted map were accurate.

The Petitioners assert that the published notices were inaccurate and misleading because they stated that all of Powderhorn Peninsula was subject to the amendment of Comprehensive Plan. The Petitioners state that "it is apparent from the 2005 Kootenai County Zoning Map and the enlargement of the Powderhorn Peninsula that follows is that a substantial amount of the Powderhorn Peninsula" was already Rural Residential.

The Petitioners argument fails because they are relying on the zoning map. This is not a zoning matter. There is no Rural Residential zoning classification. The published notices clearly stated that the Powderhorn "requests to change the future land use designation on approximately 2,725 acres from Agricultural, Timber and Federal." Clearly, the published notices stated that Powderhorn sought to amend the Comprehensive Plan designation, and this is exactly what took place. There was no error in the published notices.

III. CONCLUSION

In conclusion, it is clear that the assertions made by the Petitioners are totally unfounded and in error. The initial application of Powderhorn did not seek to amend the zoning map. The notice of requirements of Idaho Code § 67-6511were not required to be met by Kootenai County because this is not a zoning case. The amendment to the Comprehensive Plan does not raise grounds for "taking" claim. None of the property on Powderhorn Peninsula was rezoned "Rural Residential" as claimed by the Petitioners. Finally, the published notices were not incorrect and erroneous. The notice provided to the public and the adjoining land owners was proper under Idaho Code § 67-6509. For reasons stated above, the decision of the Board of Commissioners should be affirmed.

DATED this 20th day of June, 2007.

LUKINS & ANNIS, P.S.

By _____
MISCHELLE R. FULGHAM, ISB #4623
PETER J. SMITH IV, ISB #6997
Attorneys for Intervenors Powderhorn Communities LLC and Heartland LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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Attorney at Law
401 Front St
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Coeur d' Alene, ID 83816

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- ☑ First-Class Mail
- ☐ Overnight Mail
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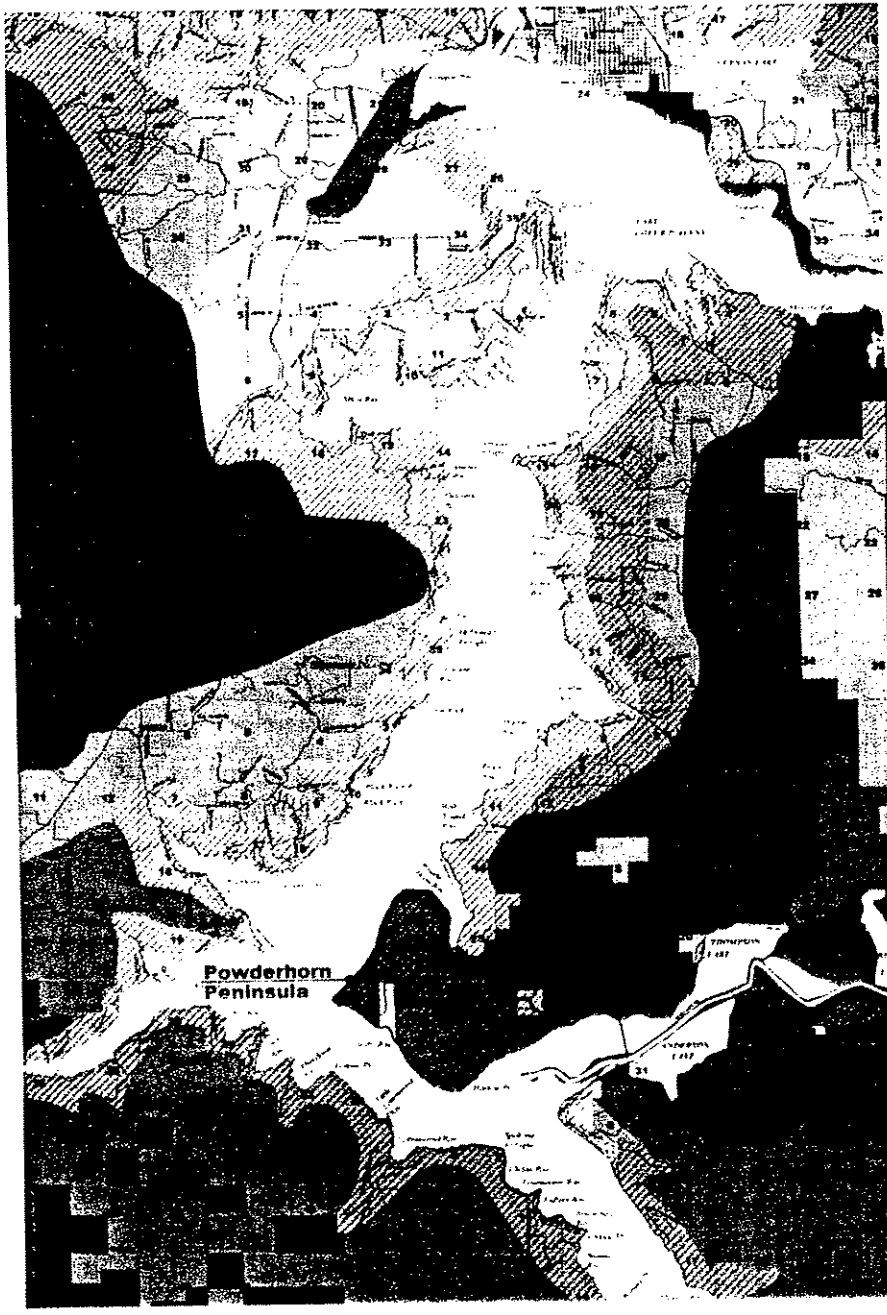
_____
MISCHELLE R. FULGHAM
PETER J. SMITH IV



Comp Plan is inconsistent with zoning and substantial changes in area's character.

Existing Comprehensive Plan

- Agriculture
- Federal Lands
- Open Space Limited Res
- Rural
- Rural Residential
- Timber
- Tribal Trust
- Surface Water Surface Area

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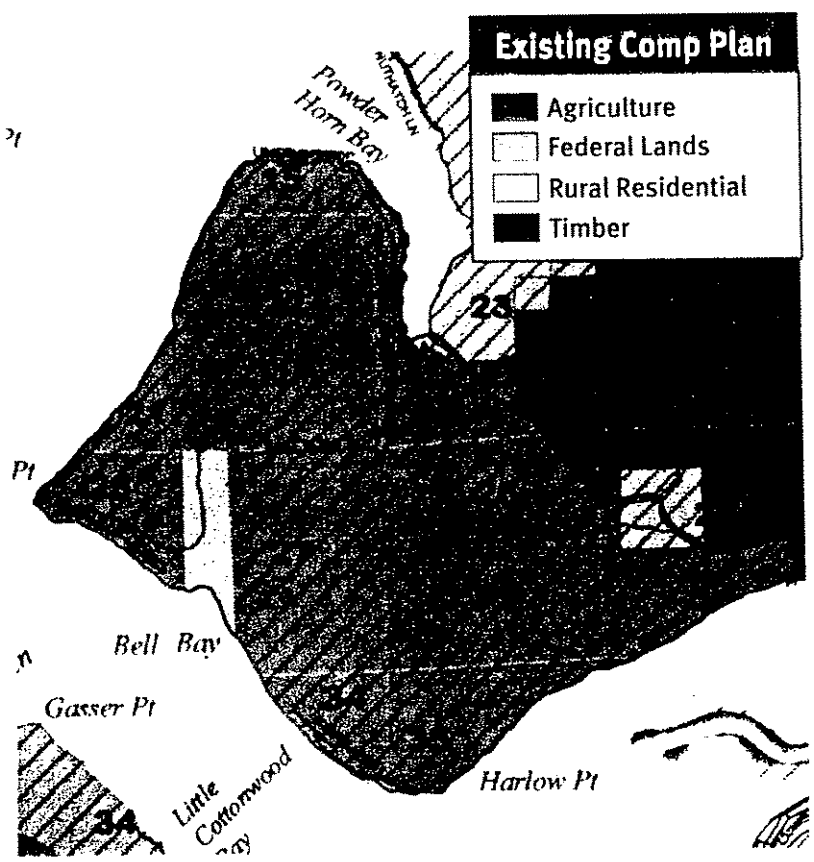
EXHIBIT A

Page 1 of 2

Summary of Request

Amend the Comprehensive Plan land use designation from Agriculture to Rural Residential.



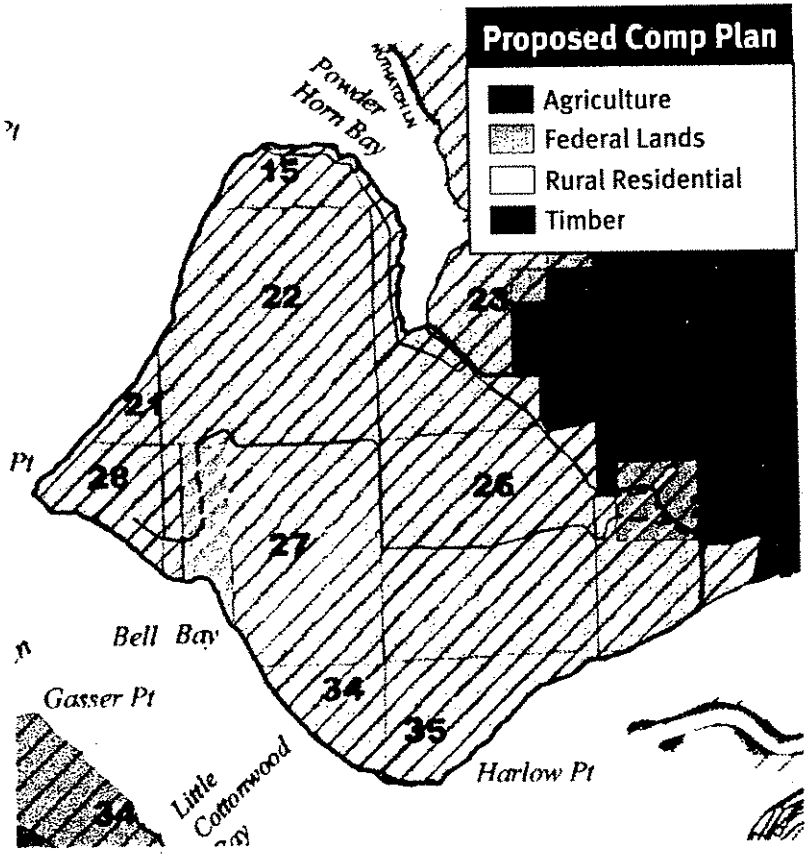


EXHIBIT A
Page 2 of 2

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STATE OF IDAHO)
County of Kootenai) SS
FILED 7-25-07

AT 10:05 O'clock A M
CLERK, DISTRICT COURT

Deputy Clerk

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, PRESERVE OUR RURAL COMMUNITIES, KOOTENAI ENVIRONMENTAL ALLIANCE, INC., NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERVYN and JEAN NELSON,
Plaintiffs,

vs.

KOOTENAI COUNTY, KOOTENAI COUNTY BOARD OF COMMISSIONERS; S. J. "GUS" JOHNSON, ELMER R. "RICK" CURRIE and KATIE BRODIE, personally and individually,
Defendants,

POWDERHORN COMMUNITIES LLC and HEARTLAND LLC and COEUR D'ALENE LAND COMPANY, and H.F. MAGNUSON,
Intervenors/Respondents.

CASE NO. CV2006-8574

MEMORANDUM DECISION

This matter is before the Court on an appeal from a decision by the Kootenai County Board of Commissioners, (hereinafter, the Board) amending the Comprehensive Plan. The procedures for amending the Comprehensive Plan are addressed in §67-6509 of the Local Land Use Planning Act, (LLUPA), and the

Kootenai County ordinances adopted thereunder. Within the twenty-eight (28) days of the issuance of the Board's decision, as provided in §67-6521(1)(d), petitioner sought judicial review of final agency action, pursuant to §67-5270, Idaho Code.

The procedure for amending the Comprehensive Plan has been initiated by an application by Heartland, LLC acting on behalf of Powderhorn Communities, LLC. Applicant moved to intervene and participate with the County in responding to the petition for judicial review. The Motion to Intervene was granted.

The original applicant, Powderhorn Communities LLC by way of Heartland, LLC, (herinafter Powderhorn) was seeking to amend the Comprehensive Plan with regard to an area of approximately three-thousand (3,000) acres. While applicant was the owner of property located within the three-thousand (3,000) acres, applicant did not own all the property. Numerous pieces of property with other owners were also included. Coeur d'Alene Land Company and H.F. Magnuson, as one of the owners of these other parcels of property within the three-thousand (3,000) acre area covered by the applicant's proposed amendment of the Comprehensive Plan, also sought to intervene. That Motion was also granted.

JURISDICTION FOR JUDICIAL REVIEW OF AGENCY ACTION

On appeal, there is a threshold issue regarding the power of the Court to proceed with judicial review of the County decision as a final agency action. It is not clear to this Court if the County itself is arguing lack of jurisdiction. The

County may be arguing that even assuming the Court does have the power of judicial review, the County has nonetheless complied, and the appeal should be dismissed on the merits.

The County argues that this agency action was not really an amendment to the Comprehensive Plan, but is merely a change in the Comprehensive Plan Future Land Use Map. However, the County concedes in its Brief that it processed the application pursuant to the procedures under §67-6509 which apply to an amendment of a Comprehensive Plan. Furthermore, the decision by Order of the Board expressly reflects an amendment to the Comprehensive Plan in its Conclusions of Law. This Court concludes that the Board decision was an amendment to the Comprehensive Plan, and any question of judicial review is to be considered in that context. Certainly, from the Intervenors perspective, there is no question but that the jurisdictional issue has been expressly and strenuously raised, as both Intervenors argue repeatedly that there is no power of judicial review of this decision as an agency action.

The County at times expressly treated the application as a legislative matter. However, the application was by only one property owner among several property owners within the area in question. As the County points out, whether this application could involve "specific individuals, interests or situations" constituting quasi-judicial activity under *Burt v. City of Idaho Falls*, 105 Idaho 65 (1983), is not entirely clear. Kootenai County ordinances do not specifically address whether an application for amendment to the Comprehensive Plan by a specific individual is quasi-judicial (based upon the fact it is initiated by a specific

land owner) or legislative (a general overview initiated by the legislative body itself). While it would certainly appear possible under LLUPA for a county to enact ordinances indicating that applications for amendments to the Comprehensive Plan initiated by private parties are to be treated as quasi-judicial, and that legislative action amending a Comprehensive Plan could only be initiated by the governing body itself, Kootenai County does not appear to have specifically addressed the issue.

In this Court's view, an application by a private land owner for an amendment to the Comprehensive Plan could be treated by the Board as a legislative matter. Intervenors argue that, since the Board's decision can be classified as a legislative matter, the Board's action is beyond the powers of judicial review of final agency action.

Intervenors, (and perhaps the County as well) argue that the amendment to the Comprehensive Plan, adopted by the County pursuant to §67-6509 and any ordinances enacted by the County thereunder, even if conducted pursuant to an unlawful procedure by the County, cannot be reviewed by the Court pursuant to an appeal under §67-6521(1)(d) of LLUPA because the decision is legislative and beyond powers of judicial review of agency action.

Intervenors and the County concede the Court could review the action by the County, but only by way of a declaratory judgment action, not pursuant to judicial review of agency action. Technically, this concession seems to this Court to moot the jurisdictional issue. Petitioner filed a petition for review within the twenty-eight (28) days as required. The petition has since been amended to add

a declaratory judgment action. The declaratory judgment cause of action raises the exact same questions regarding unlawful procedure as would be raised pursuant to a petition for judicial review of an agency action. Therefore, it would appear to this Court that, assuming there is a lack of jurisdiction to reach a question of unlawful procedure pursuant to power of judicial review of agency action, a court could simply make the same decision under the rubric of a declaratory judgment action.

However, this does not appear to be an appropriate analysis because it would sidestep the issue of the scope of judicial review. The issue of the power and scope of judicial review has been a fundamental concern of the judicial branch of the United States government since the days of Chief Justice John Marshall and the decision in *Marbury v. Madison*. Although only a trial court, it nonetheless seems to this Court to be its duty to address an argument that seeks to define the powers of judicial review.

Furthermore, it appears to this Court that the argument, that the Court lacks jurisdiction to review this matter under the powers of judicial review of final agency action, runs directly contrary to established Idaho case law, as set forth in *Price v. Payette County*, 131 Idaho 426 (1998). Therefore, it appears to this Court that the Intervenors argument is an invitation to a trial court to simply disregard a rule of law established by the Idaho Supreme Court.

It is this Court's interpretation of the holding in *Price* that the procedure followed by the County in amending its Comprehensive Plan is reviewable by a court sitting in its appellate capacity to conduct the judicial review of final agency

action, specifically provided for in Idaho statutes under the Idaho Administrative Procedures Act, including §67-5279, Idaho Code.

Intervenors argue that *Price* also involved a rezoning application, and is therefore inapplicable. However, the Idaho Supreme Court specifically addressed the scope of judicial review of a county's action regarding an amendment of a Comprehensive Plan. In *Price*, the district court acting in its appellate capacity, had determined the procedure, followed by the county in amending its Comprehensive Plan, was unlawful. The Idaho Supreme Court affirmed, without limiting its holding to only Comprehensive Plan amendment proceedings where there was a concurrent rezone application pending.

In *Price,* the County amended the Comprehensive Plan. The Idaho Supreme Court held that a second hearing was required in order for the Board to amend the Plan. The Planning Commission had recommended to the Board that the proposed amendment of the Comprehensive Plan be denied. The Board held a hearing and decided that the Comprehensive Plan should be amended. The district court had held that in those circumstances, the Board needed to have held a second hearing before adopting the amendment. The district court had remanded the matter for purposes of holding a second hearing. The Board had held the second hearing and again approved the proposed amendment to the plan. On appeal, the County argued that the district court was incorrect in requiring a second hearing. The Idaho Supreme Court disagreed, holding that the County "should have held a second public hearing before it adopted the amendment to the Comprehensive Plan." Not only that, the Idaho Supreme Court

went on to hold that the district court's remedy, of remanding to the Board for purposes of holding a second hearing, was an inadequate remedy, and that the district court should have set aside the decision by the Board amending the Comprehensive Plan, and remanded the matter to the County for an entirely new set of hearings. (Note the use of the plural).

In the case at bar, the Planning Commission voted to deny the applicant Powderhorn's proposed amendment to the Comprehensive Plan. The Planning Commission sent its recommendation to the Board. The Board held a hearing, and then approved the application to amend the Comprehensive Plan. As required by §67-6509(b), Idaho Code, and by the holding in *Price,* the Board was required to hold a second or further hearing, on the proposed amendment to the Comprehensive Plan, before the Comprehensive Plan could be amended.

Pursuant to §67-6509(b) the Board can act upon a proposed amendment to the Comprehensive Plan only upon receipt of a recommendation from the Planning Commission. The statute specifically states that if, following that public hearing, the Board "makes a material change in the recommendation... concerning...amendment...of a plan, further notice and hearing shall be provided before the governing board....amends....the plan." The statute appears to set forth the procedure where in some circumstances the Board could make a final decision after only one (1) hearing, such as action taken by the Board to approve the recommendation as received from the Planning Commission. However, if the Board determines that it is going to change the recommendation of the Planning Commission and, as here, approve the amendment to the plan, then this is a

material change in the recommendation received from the Planning Commission. Before the Board can in fact approve the proposed amendment, the Board has to have a second hearing with regard to the material change the Board has made in the recommendation it has received from the Planning Commission. It seems to be beyond debate that the decision by the Board to reverse the Planning Commission recommendation from a denial to an approval does constitute a material change by the Board in the recommendation that it has received from the Planning Commission.

The procedure at the Board level with regard to a second hearing is similar to the statutory procedure for the Planning Commission pursuant to §67-6509(a). A Planning Commission is to review a proposed amendment. The Planning Commission can either approve or deny the proposed amendment, following a public hearing. However, if the Planning Commission makes a material change in the proposed amendment to the comprehensive plan, a second hearing is required. The second hearing can either be before the Planning Commission or before the governing board (here, the Board). Regardless of which body holds the second hearing, where there is a material change to the proposed amendment that has been considered by the Planning Commission, then there has to be another hearing regarding the material change in the proposed amendment, before the plan can be amended.

While the language of *Price* expressly requires a second hearing in front of the Board when the Board reverses a recommendation received from the Planning Commission, it is not clear to this Court that the Board would need to

have a second hearing following its first hearing on the recommendation, if the Board simply adopts the recommendation received from the Planning Commission. *Price* may leave open the question as to whether, if the Planning Commission had in fact recommended the adoption of the proposed amendment by Powderhorn, the Board could have held its public hearing, and if it then simply affirmed the recommendation by the Board, then no second or further hearing by the Board may have been necessary. However, this Court need not decide this issue, as the facts of this case are identical to the facts in the case that was before the Supreme Court in *Price*.

THE BOARD FAILED TO HOLD THE STATUTORILY MANDATED SECOND HEARING

The County and the Intervenors argue that, assuming a second hearing was required following the Board's decision to reverse the recommendation it had received from the Planning Commission, this required second hearing was in fact provided. The decision by the Board to reverse the recommendation it had received from the Planning Commission was made at a deliberation hearing on October 5, 2006. The vote was 2 to 1. No testimony was taken; no public input was received. Following that vote, the only other meeting that occurred was a Board meeting on November 9, 2006. Although this was a regularly noticed Board meeting, it certainly was not noticed pursuant to the same procedures as the first hearing. Nor was there any sort of hearing procedure. The matter came before the Board, only on a motion to approve "signings" of several cases that

were before the Board, including the case in question. Under Ordinance 355, §2-1-4(E), in all hearings for quasi-judicial or legislative matters, the procedure includes requiring each person wishing to testify to properly identify themselves for the record. Further, §E makes reference to "after the close of the public hearing." A motion to approve "signings" can hardly be said to comport with the procedures for hearing on legislative matters as set forth in the County ordinance.

For this Court to hold that the procedures, after the October 5, 2000 vote that are in the record in this matter, somehow satisfy the statutorily mandated second or further hearing, which the Board had to hold in regard to its decision to reverse a recommendation it has received from the Planning Commission, would seem to make a mockery of the law as enacted by the legislature.

LEGISLATIVE OR QUASI-JUDICIAL ACTIVITY

In determining the scope of judicial review, this Court has necessarily had to decide the issue of unlawful procedure of a final agency action in amending a Comprehensive Plan. In so doing the Court determined that judicial review was appropriate of the Board's decision, regardless of whether the County action was classified as legislative or quasi judicial.

The classification of these proceedings as either legislative or quasi-judicial is a difficult issue. This Court's view of *Price* is that judicial review, of this agency action as an unlawful procedure violating the mandatory procedures of §67-6509(b), is appropriate, regardless of whether the procedure is classified as legislative or quasi-judicial, and the failure of a county to follow the statutorily

mandated second or further hearing before amending a Comprehensive Plan requires reversal and remand.

If presumed legislative, judicial review would presumably be at the restrained level of whether the decision was confiscatory, arbitrary, unreasonable or capricious, as set forth in *Burt v. City of Idaho Falls,* 105 Idaho 65 (1983). Because *Price* is dispositive, the Court does not need to actually decide the other issues raised in this proceeding. However, without holding that this matter is legislative, the Court would nonetheless note that, if considering other issues raised by the parties solely under the restrained level of judicial review, it would appear to the Court that a reviewing court would properly defer to the Board's decision.

CONCLUSION

This Court concludes that the Board's decision was a final agency action and an approval of an amendment to the Comprehensive Plan. This approval was pursuant to LLUPA. The petition appropriately appealed this decision as a final agency action under LLUPA. Judicial review by a district court acting in its appellant capacity is appropriate under the Idaho Administrative Procedure Act. Procedures under LLUPA require, under the circumstances of this case, for the Board to hold a second hearing, following its decision not to follow the recommendation of the Planning Commission. No such second hearing was held. Under *Price*, the Court has an obligation to reverse the decision by the County and remand for further proceedings pursuant to the law.

In this Court's view, an appropriate remedy would be to simply remand for the statutorily mandated second hearing by the Board. However, in *Price,* the Supreme Court specifically noted that the district court remedy of remanding for a second hearing was inadequate, and that the district court was required to reverse and remand for "a new set of hearings".

This Court is not entirely sure as to why the Supreme Court held that a remand for a second hearing is an inadequate remedy. However, the direction in *Price* from the Supreme Court seems clear. It is therefore necessary to reverse and remand this matter for further hearings.

For further direction on remand, it would be the position of this Court that the Board could choose to hold the further hearings at the Board level with regard to the recommendation that has been forwarded by the Planning Commission. If after consideration following a public hearing, the Board follows the recommendation of the Planning Commission, and denies the proposed amendment, no further hearing at the Board level would be required. If the Board decides to make a material change in the Planning Commission's recommendation then further notice and a second hearing shall be provided before the Board can amend the Plan.

DATED this 25 day of July, 2007.

CHARLES W. HOSACK, DISTRICT JUDGE

Clerk's Certificate of Mailing

I hereby certify that on the 25th day of July, 2007, that a true and correct copy of the foregoing was mailed/delivered by regular U.S. Mail, postage prepaid, interoffice mail, hand delivered or faxed as indicated below:

Fax Scott W. Reed (fax: 208-765-5117)
Fax Michelle R. Fulgham (fax: 509-363-2478)
Fax John A. Cafferty (fax: 208- 446-1621)
Fax John F. Magnuson (fax: 208-667-0500)

DANIEL J. ENGLISH
CLERK OF THE DISTRICT COURT

BY: _____
Deputy Clerk

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2007 DEC 15 AM 10:46

CLERK DISTRICT COURT

DEPUTY

ORIGINAL

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID 83816
Phone (208) 664-2161
FAX (208) 765-5117

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit, unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a *non-profit corporation*; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON; **Plaintiffs/Petitioners,** **v.** **KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R., "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,** **Defendants/Respondents,** **and** **POWDERHORN COMMUNITIES, LLC, and HEARTLAND, LLC, and COEUR D'ALENE LAND COMPANY and H. F. MAGNUSON,** **Intervenors/Respondents.**	**Case No. CV-06-8574** **JUDGMENT**

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Pursuant to notice, hearing was held on June 5, 2007 upon the merits of this case. Plaintiffs/Petitioners Neighbors for Responsible Growth et al were represented by Scott W. Reed, attorney at law. Defendants/Respondents Kootenai County et al were represented by County Civil Attorney John A. Cafferty. Intervenors/Respondents Powderhorn Communities, LLC and Heartland, LLC were represented by Mischelle Fulgham of Lukins & Annis, attorneys at law. Intervenors/Respondents Coeur d'Alene Land Company and H.F. Magnuson were represented by John F. Magnuson, attorney at law.

After oral argument, the Court directed the parties to submit supplemental briefs. The Court, being fully advised, entered Memorandum Decision on July 25, 2007. Based thereon,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Findings of Fact, Applicable Legal Standards, Conclusions of Law, Comprehensive Plan Analysis and Order of Decision in Case No. CP-080-05 as entered on November 9, 2006 and as amended November 16, 2006 be, and they are hereby, declared null and void and that this case be remanded back to the Kootenai County Board of Commissioners with directions to undertake the following procedures:

(1) The Kootenai County Board of Commissioners shall, pursuant to applicable regulations, hold a public hearing to consider the recommendation by the

Kootenai County Planning Commission on May 26, 2006 denying the Request for Amendment of the Comprehensive Plan made by Intervenors/Respondents Powderhorn Communities, LLC and Heartland, LLC.

If after consideration following a public hearing, the Board follows the recommendation of the Planning Commission and denies the proposed amendment, no further hearing at the board level would be required.

2. However, if the Board decides to make a material change in the Planning Commission's recommendation, then further notice and a second public hearing shall be provided before the Board can amend the plan.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs/Petitioners Neighbors for Responsible Growth, et al be awarded their costs, but not attorney's fees, as against Defendants/Respondents Kootenai County and Intervenors/Respondents Powderhorn Communities, LLC and Heartland, LLC and Coeur d'Alene Land Company and H. F. Magnuson, to be submitted pursuant to Rule 54 (d) (1) et seq., I.R. Civ.P.

Dated this 13 day of August, 2007.

CHARLES W. HOSACK
DISTRICT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing is sent by first class mail, postage prepaid or faxed, this 15 day of ~~July~~ Aug, 2007 to:

JOHN CAFFERTY, ESQ.
KOOTENAI COUNTY DEPT. OF
LEGAL SERVICES
451 GOVERNMENT WAY
P. O. BOX 9000
COEUR D'ALENE, IDAHO 83816-9000
FAX (208) 446-1621

MISCHELLE FULGHAM
LUKINS & ANNIS, P.S.
ATTORNEYS AT LAW
1600 WASHINGTON TRUST
FINANCIAL CENTER
717 WEST SPRAGUE AVENUE
SPOKANE, WA 99204-0466
FAX (509) 747-2323

JOHN F. MAGNUSON
ATTORNEY AT LAW
P. O. BOX 2350
COEUR D'ALENE, IDAHO 83816
FAX (208) 667-0500

SCOTT W. REED
ATTORNEY AT LAW
P. O. BOX A
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FAX (208) 765-5117

DANIEL J. ENGLISH
Joanna Barber
10:48 AM

MISCHELLE R. FULGHAM, ISB #4623
PETER J. SMITH IV, ISB #6997
LUKINS & ANNIS, P.S.
250 Northwest Blvd., Ste 102
Coeur d'Alene, ID 83814-2971
Telephone: (208) 667-0517
Facsimile No.: (509) 363-2478

Attorneys for Intervenors Powderhorn Communities LLC and Heartland LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON,

Plaintiffs,

v.

KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants,

and

POWDERHORN COMMUNITIES LLC, and HEARTLAND LLC, and COEUR D'ALENE LAND COMPANY, and H.F. MAGNUSON,

Intervenors/Respondents.

NO. CV-06-8574

OBJECTION TO PROPOSED JUDGMENT AWARD OF COSTS

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INTERVENORS POWDERHORN COMMUNITIES LLC and HEARTLAND LLC (hereinafter "Powderhorn") object to the proposed Judgment submitted via letter to Judge Hosack on July 27, 2007, by Plaintiffs/Petitioners attorney of record, Scott W. Reed. Grounds for this objection are that Petitioners inserted language into their proposed Judgment automatically awarding costs. This is in error and legally improper—both procedurally and substantively. Petitioners have never moved for costs; Petitioners have never provided any legal citation or authority for a claim for costs; and, Petitioners have never provided any supportive briefing for such a claim. Petitioners do not meet the standards for an award under I.C. 12-117, nor do Petitioners qualify under Rule 54. These issues and applicable legal standards need to be briefed and addressed in a motion for costs before any award can be entered. Aside from the lack of any motion for costs, no legal or factual basis exists for an award of costs. It is improper to award them via a letter to the Judge in the proposed Judgment.

Petitioners are not entitled to costs under Rule 54 because Petitioners are not "prevailing parties." Petitioners failed to successfully establish a single claim or issue raised to the Court. It was the Court, acting *sua sponte,* that found an issue for remand. Nothing alleged by the Petitioners or briefed by the Petitioners in their numerous pleadings caused them to be a prevailing party. The Court essentially acknowledged that none of Petitioners' arguments or issues was grounds for remand. The Court expressly stated, "..<u>if considering other issues raised by the parties</u> solely under the restrained level of judicial review, <u>it would appear to the Court that a reviewing court would properly defer to the Board's decision</u>." *See Memorandum Decision,* p. 11 (emphasis added). Thus, none of the issues raised by the parties required a remand. It was <u>only</u> the issue regarding multiple hearings on the comprehensive plan raised by the Court *sua sponte* that caused the Court to order a remand. Thus, Petitioners were not successful on any of their issues or claims and are not prevailing parties entitled to any costs.

Petitioners are not entitled to costs under IC 12-117, nor have they requested such an award. Petitioners cannot meet the standard of IC 12-117, because they have not shown and can not show that Respondent acted without a reasonable basis in fact or law.

Lastly, Intervenors previously indicated to Petitioners that they objected to the insertion of costs in the proposed judgment. In response, on August 9, 2007 Petitioners withdrew their proposed Judgment dated July 27, 2007 and submitted an alternative proposed Judgment that did not seek an award of costs. It was this August 9, 2007 judgment that the parties had agreed to. In his letter to the Court dated August 9, 2007, Petitioners' attorney Scott Reed indicated and confirmed that he had agreed to revise the judgment and remove the language that awarded costs.

Thus, the Petitioners' proposed Judgment dated August 9, 2007 and not the Petitioners' proposed judgment dated July 27, 2007 should be entered. No award of costs is legally or factually appropriate, nor has any such award been properly requested.

DATED this 10 day of August 2007.

LUKINS & ANNIS, P.S.

By _____
MISCHELLE R. FULGHAM, ISB #4623
PETER J. SMITH IV, ISB #6997
Attorneys for Intervenors Powderhorn Communities LLC and Heartland LLC

609

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of August, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Scott W. Reed
Attorney at Law
401 Front St
P. O. Box A
Coeur d' Alene, ID 83816

- ☐ Hand-delivered
- ☐ First-Class Mail
- ☐ Overnight Mail
- ☑ Facsimile – 208-765-5117

John A. Cafferty
Kootenai County Legal Services
P. O. Box 9000
Coeur d'Alene, ID 83816

- ☐ Hand-delivered
- ☐ First-Class Mail
- ☐ Overnight Mail
- ☑ Facsimile – 208-446-1621

John F. Magnuson
Attorney At Law
1250 Northwood Center Ct., Suite A
P. O. Box 2350
Coeur d'Alene, ID 83816

- ☐ Hand-delivered
- ☐ First-Class Mail
- ☐ Overnight Mail
- ☑ Facsimile – 208-667-0500

MISCHELLE R. FULGHAM
PETER J. SMITH IV

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED:

2007 AUG 24 PM 4:06

CLERK DISTRICT COURT

DEPUTY

ORIGINAL

MISCHELLE R. FULGHAM
ISB #4623
PETER J. SMITH IV
ISB #6997
LUKINS & ANNIS, P.S.
Ste 102
250 Northwest Blvd.
Coeur d'Alene, ID 83814-2971
Telephone: (208) 667-0517
Facsimile No.: (509) 363-2478

Attorneys for Applicant Powderhorn Communities LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON,

Plaintiffs,

v.

KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants,

and

POWDERHORN COMMUNITIES LLC; HEARTLAND LLC; COEUR D'ALENE LAND COMPANY; and H.F. MAGNUSON,

Intervenors/Respondents.

NO. CV-06-8574

STIPULATION RE JUDGMENT ENTERED ON AUGUST 15, 2007

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COME NOW the above-named parties, Plaintiffs/Petitioners Neighbors for Responsible Growth, et al.; Defendant/Respondent Kootenai, Intervenors/Respondents Heartland LLC, Powderhorn Communities LLC, Coeur d'Alene Land Company, and H.F. Magnuson, by and through their attorneys of record, and hereby stipulate and agree that the August 9, 2007, proposed judgment (attached as Ex. A) which does not award costs should be entered and not the July 29, 2007, proposed judgment which does award costs.

Plaintiffs/Petitioners Neighbors for Responsible Growth, et al., reserve the right to file a Memorandum of Costs under Rule 54, I.R.C.P. after entry of final judgment.

Defendants Kootenai County and Intervenors/Respondents Heartland LLC, Powderhorn Communities LLC, Coeur d'Alene Land Company, and H.F. Magnuson reserve the right to object to the allowance of any costs.

Dated this 20th day of August, 2007.

Lukins & Annis, P.S.

By: _____
Mischelle R. Fulgham, ISB #4623
Peter J. Smith IV, ISB #6997
Attorneys for Intervenors/Respondents
Powderhorn Communities, LLC and
Heartland LLC

By: _____
Scott W. Reed, ISB #818
Attorney for Plaintiffs/Petitioners

STIPULATION RE JUDGMENT ENTERED
ON AUGUST 15, 2007

612

Kootenai County Legal Services

By: _____
~~John A. Cafferty, ISB, #5607~~ Patrick M. Braden, ISB #
Attorneys for Defendants/Respondents

By: _____
~~John F. Magnuson~~, ISB, #4270
Attorneys for Intervenors/Respondents
Coeur d'Alene Land Company and
H.F. Magnuson

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2007 AUG 29 PM 4:14

CLERK DISTRICT COURT
DEPUTY

Scott W. Reed, ISB#818
Attorney at Law
P. O. Box A
Coeur d'Alene, ID. 83816
Phone (208) 664-2161
FAX (208) 765-5117

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit, unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON; **Plaintiffs/Petitioners,** **v.** **KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R., "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,** **Defendants/Respondents,** **and** **POWDERHORN COMMUNITIES, LLC, and HEARTLAND, LLC, and COEUR D'ALENE LAND COMPANY and H. F. MAGNUSON,** **Intervenors/Respondents.**	*Case No. CV-06-8574* **JUDGMENT**

Pursuant to notice, hearing was held on June 5, 2007 upon the merits of this case. Plaintiffs/Petitioners Neighbors for Responsible Growth et al were represented by Scott W. Reed, attorney at law. Defendants/Respondents Kootenai County et al were represented by County Civil Attorney John A. Cafferty. Intervenors/Respondents Powderhorn Communities, LLC and Heartland, LLC were represented by Mischelle Fulgham of Lukins & Annis, attorneys at law. Intervenors/Respondents Coeur d'Alene Land Company and H.F. Magnuson were represented by John F. Magnuson, attorney at law.

After oral argument, the Court directed the parties to submit supplemental briefs. The Court, being fully advised, entered Memorandum Decision on July 25, 2007. Based thereon,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Findings of Fact, Applicable Legal Standards, Conclusions of Law, Comprehensive Plan Analysis and Order of Decision in Case No. CP-080-05 as entered on November 9, 2006 and as amended November 16, 2006 be, and they are hereby, declared null and void and that this case be remanded back to the Kootenai County Board of Commissioners with directions to undertake the following procedures:

(1) The Kootenai County Board of Commissioners shall, pursuant to applicable regulations, hold a public hearing to consider the recommendation by the

Kootenai County Planning Commission on May 26, 2006 denying the Request for Amendment of the Comprehensive Plan made by Intervenors/Respondents Powderhorn Communities, LLC and Heartland, LLC.

If after consideration following a public hearing, the Board follows the recommendation of the Planning Commission and denies the proposed amendment, no further hearing at the board level would be required.

2. However, if the Board decides to make a material change in the Planning Commission's recommendation, then further notice and a second public hearing shall be provided before the Board can amend the plan.

Dated this 27 day of August, 2007.

CHARLES W. HOSACK
DISTRICT JUDGE

CLERK'S CERTIFICATE OF SERVICE

I certify that a copy of the above and foregoing is sent by first class mail, postage prepaid or faxed, this 29 day of August, 2007 to:

JOHN CAFFERTY, ESQ.
KOOTENAI COUNTY DEPT. OF
LEGAL SERVICES
451 GOVERNMENT WAY
P. O. BOX 9000
COEUR D'ALENE, IDAHO 83816-9000
FAX (208) 446-1621

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1600 WASHINGTON TRUST
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717 WEST SPRAGUE AVENUE
SPOKANE, WA 99204-0466
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FAX (208) 667-0500

SCOTT W. REED
ATTORNEY AT LAW
P. O. BOX A
COEUR D'ALENE, IDAHO 83816
FAX (208) 765-5117

Susan McCoy

FIRST JUDICIAL DISTRICT KOOTENAI COUNTY
CLERK OF COURT
STATE OF IDAHO

MISCHELLE R. FULGHAM, ISB #4623
PETER J. SMITH IV, ISB #6997
LUKINS & ANNIS, P.S.
250 Northwest Blvd., Ste 102
Coeur d'Alene, ID 83814-2971
Telephone: (208) 667-0517
Facsimile No.: (509) 363-2478

Attorneys for Intervenors Powderhorn Communities LLC and Heartland LLC

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unicorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unicorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON,
Plaintiffs/Respondents,

v.

KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,
Defendants,

and

POWDERHORN COMMUNITIES LLC, and HEARTLAND LLC,
Intervenors/Appellants

And

COEUR D'ALENE LAND COMPANY, and H.F. MAGNUSON,
Intervenors

NO. CV-06-8574

NOTICE OF APPEAL BY INTERVENORS POWDERHORN COMMUNITIES, LLC AND HEARTLAND LLC'S

Fee Category: T
Fee: $86.00

618

TO: THE ABOVE-NAMED PLAINTIFFS, NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unicorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unicorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON, AND YOUR ATTORNEY OF RECORD, SCOTT REED;

AND TO:

THE ABOVE-NAMED DEFENDANTS, KOOTENAI COUNTY, a political subdivision of the STATE OF IDAHO acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually, AND YOUR ATTORNEY OF RECORD, PATRICK BRADEN;

AND TO:

THE ABOVE-NAMED INTERVENORS COEUR D'ALENE LAND COMPANY AND H.F. MAGNUSON, AND YOUR ATTORNEY OF RECORD, JOHN F. MAGNUSON

AND TO:

THE CLERK OF THE ABOVE-ENTITLED COURT

Notice is hereby given that:

1. The Appellants to this action are:

INTERVENORS POWDERHORN COMMUNITIES, LLC
INTERVENORS HEARTLAND, LLC

2. The above-named Appellants appeal against the following parties characterized as Respondents here:

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unicorporated association;
PRESERVE OUR RURAL COMMUNITIES, a non-profit unicorporated association;
KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation;
NORBERT and BEVERLY TWILLMANN;
GREG and JANET TORLINE;
SUSAN MELKA;
MERLYN and JEAN NELSON

3. The above-named Appellants appeal to the Idaho Supreme Court from the following Orders and Judgments entered by the District Court, the Honorable Judge Charles W. Hosack presiding:

(a) Order Granting Motion to Intervene and Granting Motion to Stay (entered December 19, 2006);

(b) Memorandum Decision (entered July 25, 2007);

(c) Judgment (entered August 15, 2007);

(d) Judgment (entered August 29, 2007)

4. Appellants Powderhorn and Heartland have a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(f) I.A.R.

5. The issues on appeal shall include, but not be limited to, the following:

(a) Whether the District Court erred by granting a stay.

(b) Whether the District Court erred by refusing to impose terms when granting a stay.

(c) Whether the District Court erred by allowing the Plaintiffs to Amend their Petition for Judicial Review unilaterally, without notice to the parties, without the opportunity to object or respond, and without judicial notice or approval.

(d) Whether the District Court erred by allowing the Plaintiffs to Amend their Petition for Judicial Review to add a declaratory relief claim after the deadline for filing an appeal had passed.

(e) Whether the District Court lacked jurisdiction over the Plaintiffs' Petition for Judicial Review.

(f) Whether the District Court erred in deciding a legislative matter appealing the Kootenai County Comprehensive Plan Future Land Use Map in a Petition for Judicial Review filed under the Local Land Use Planning Act (LLUPA) and the Administrative Procedures Act (APA).

(g) Whether the District Court erred by determining an amendment to the Comprehensive Plan Land Use Map was a quasi-judicial matter and not a legislative matter.

(h) Whether the District Court erred by allowing Plaintiffs to submit and argue evidence not in the Agency Transcript or Agency Record on a Petition for Judicial Review.

(i) Whether the District Court erred by *sua sponte* raising a new issue for the first time on appeal during the final hearing on the merits when the issue was not previously raised by the Plaintiffs before the agency and was not previously raised in any of Plaintiffs' briefing or arguments.

(j) Whether the District Court erred by holding that Idaho Code 67-6509(b) requires additional public hearings beyond the five hearings held by Kootenai County.

(k) Whether the District Court erred by holding that zone change standards and legal authorities applied to a Comprehensive Plan amendment.

(l) Whether the District Court erred in its interpretation of Idaho Code 67-6509(b) by requiring that the Kootenai County Commissioners decide and announce the rejection of a Planning Commission recommendation before the County Commissioners held a public hearing to obtain public testimony and evidence to support the Commissioners' previously issued decision of rejection.

(m) Whether the District Court erred by holding the facts of this case are identical to the facts before the Supreme Court in *Price v. Payette County*, 131 Idaho 426 (1998) when that case involved an appeal of a quasi-judicial zone change and this case did not.

(n) Whether the District Court erred in holding that this case involved a material change to the Comprehensive Plan which required an additional hearing under *Price v. Payette County* and Idaho Code 67-6509(b).

(o) Whether the District Court erred in not affirming the agency action when the appellants suffered no prejudice of any substantial right, and did not argue or assert any prejudice of a substantial right.

(p) Whether the District Court erred in allowing Plaintiffs to proceed with an appeal under LLUPA and the APA when Plaintiffs did not timely seek judicial review within 28 days of the agency issuing the decision being appealed.

(q) Whether the District Court erred in granting costs.

This list of issues on appeal shall not prevent the Appellant from asserting other issues on appeal.

6. Has an order been entered sealing all or any portion of the record? No.

7.(a) Is a reporter's transcript requested? Yes.

(b) The appellant requests the preparation of the following portions of the reporter's transcript:

Hearing Transcript from Motion for Intervention and Stay (Dec. 18, 2006)

Hearing Transcript from Motion to Dismiss for Lack of Jurisdiction (Feb. 27, 2007)

Hearing Transcript from Motion to Dismiss for Lack of Jurisdiction, Motion to Strike Amended Petition, Objection to Amended Petition, Motion to Dismiss and Objection to Alternative Motion for Leave to Amend Petition for Judicial Review (May 31, 2007)

Hearing Transcript from Final Hearing on the Merits of Petition for Judicial Review (June 5, 2007)

8. The Appellant requests the following documents to be included in the clerk's (agency's) record in addition to those automatically included under Rule 28, I.A.R.

NO.	DOCUMENT TITLE	FILED/ENTERED
1.	Petition for Judicial Review	Nov. 15, 2006
2.	Petitioners' Motion for Stay	Dec. 8, 2006
3.	Petitioners' Brief in Support of Motion for Stay	Dec. 11, 2006
4.	Motion to Intervene as of Right, Motion for Permissive Intervention	Dec. 14, 2006
5.	Memorandum in Support of Motion to Intervene as of Right, Motion for Permissive Intervention	Dec. 14, 2006
6.	Affidavit of Mischelle R. Fulgham In Support of Motion to Intervene as of Right, Motion for Permissive Intervention	Dec 14, 2006
7.	Powderhorn Communities LLC and Heartland LLC's Memorandum In Opposition To Motion For Stay	Dec. 15, 2006
8.	Affidavit of Steve Walker	Dec. 15, 2006

9.	Order Granting Motion to Intervene and Granting Motion to Stay	Dec. 19, 2006
10.	Notice of Settlement and Filing of Agency Record and Transcript	Jan. 10, 2007
11.	Agency Record, Volumes 1 through 6	Jan. 10, 2007
12.	Agency Transcript, Volume 1	Jan. 10, 2007
13.	Supplemental Agency Transcript, Volume 1	Jan. 10, 2007
14.	Powderhorn Communities LLC and Heartland LLC's Motion to Dismiss Due to Lack of Jurisdiction	Jan. 29, 2007
15.	Powderhorn Communities LLC and Heartland LLC's Memorandum In Support of Motion to Dismiss Due to Lack of Jurisdiction	Jan. 29, 2007
16.	Amended Petition for Judicial Review	Feb. 5, 2007
17.	Petitioners' Opening Brief	Feb. 14, 2007
18.	Notice of Hearing for 2/27/07 at 3:30 p.m.	Feb. 16, 2007
19.	Motion to Intervene as a Right and/or Motion for Permissive Intervention	Feb. 16, 2007
20.	Memorandum in Support of Motion to Intervene as a Right and/or Motion for Permissive Intervention	Feb. 16, 2007
21.	Brief of Petitioners in Opposition to Intervenors' Motion to Dismiss for Lack of Jurisdiction	Feb. 16, 2007
22.	Powderhorn Communities LLC and Heartland LLC's Reply Memorandum In Support of Motion to Dismiss Due to Lack of Jurisdiction	Feb. 23, 2007
23.	Objection to Amended Petition for Judicial Review/ Motion to Strike Amended Petition	Feb. 27, 2007
24.	Order Re: Motion to Intervene	Feb. 28, 2007
25.	Response to Plaintiffs/Petitioners to Intervenors/ Respondent Powderhorn Communities, LLC Objection to Amended Petition for Judicial Review/Motion to Strike Amended Petition	Mar. 5, 2007

	Strike Amended Petition	
26.	Order Granting Motion to Intervene	Mar. 6, 2007
27.	Notice of Hearing for 6/5/07 at 3:30 p.m.	Mar. 14, 2007
28.	Respondent's Brief	Mar. 14, 2007
29.	Notice of Hearing Alternative Motion to Amend	Apr. 6, 2007
30.	Alternative Motion for Leave to Amend	Apr. 6, 2007
31.	Points and Authorities of Plaintiffs/Petitioners in Support of Motion to Amend	Apr. 6, 2007
32.	Memorandum in Support of Motion to Strike	Apr. 27, 2007
33.	Intervenors' Brief in Opposition to Petition for Judicial Review	Apr. 27, 2007
34.	Joinder in Motion to Strike	May 4, 2007
35.	Response Brief of Intervenors Coeur d'Alene Land Company and H.F. Magnuson	May 4, 2007
36.	Notice of Hearing on the Merits for 6/5/07 at 3:30 p.m.	May 16, 2007
37.	Amended Notice of Hearing for 5/31/07 at 10:00 a.m.	May 16, 2007
38.	Objection to Alternative Motion for Leave to Amend Petition for Judicial Review	May 16, 2007
39.	Notice of Hearing for 5/31/07 at 10:00 a.m.	May 21, 2007
40.	Motion to Dismiss by Intervenors Coeur d'Alene Land Company and H.F. Magnuson	May 21, 2007
41.	Objection to Alternative Motion for Leave to Amend Petition for Judicial Review	May 21, 2007
42.	Memorandum of Plaintiff/Petitioner in Opposition to Intervenors' Motion to Strike for Hearing 5/31/07	May 24, 2007
43.	Petitioners' Brief on Intervenors' Motion to Dismiss and Petitioners Motion for Leave to Amend for Hearing May 31, 2007	May 24, 2007
44.	Powderhorn Communities, LLC and Heartland LLC's	May 30, 2007

	Reply Memorandum in Support of Motion to Dismiss the Amended Petition for Judicial Review	
45.	Petitioners' Reply Brief	May 30, 2007
46.	Post-Hearing Brief of Plaintiffs/Petitioners	June 11, 2007
47.	Kootenai County's Supplemental Briefing	June 12, 2007
48.	Intervenors Powderhorn Communities, LLC and Heartland LLC's Supplemental Brief Regarding Idaho Code § 67-6509	June 13, 2007
49.	Post-Hearing Supplemental Memorandum of Authorities Submitted on Behalf of Intervenors Coeur d'Alene Land Company and H.F. Magnuson	June 13, 2007
50.	Kootenai County's Response to Submission of Supplemental Briefing	June 19, 2007
51.	Intervenors Powderhorn Communities, LLC and Heartland LLC Response to Post-Hearing Brief of Plaintiffs	June 20, 2007
52.	Memorandum Decision	June 25, 2007
53.	Judgment	August 15, 2007
54.	Objection to proposed Judgment Award of Costs	August 16, 2007
55.	Stipulation Re Judgment Entered on August 15, 2007	August 24, 2007
56.	Judgment	August 29, 2007

7. I certify:

(a) A copy of this notice of appeal has been served on the reporter.

(b)(1) The clerk of the district court or administrative agency has been paid the estimated fee of $780 for preparation of the reporter's transcript.

(c)(1) The estimated fee for preparation of the clerk's or agency's record is $115 and has been paid.

(d)(1) The appellate filing fee of $86.00 has been paid.

(e) Service has been made upon all parties required to be served pursuant to IAR 20.

DATED this 30th day of August, 2007.

LUKINS & ANNIS, P.S.

By _____
MISCHELLE R. FULGHAM, ISB #4623
PETER J. SMITH IV, ISB #6997
Attorneys for Intervenors Powderhorn Communities LLC and Heartland LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of August, 2007, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Scott W. Reed Attorney at Law 401 Front St P. O. Box A Coeur d' Alene, ID 83816	☐ ☒ ☐ ☐	Hand-delivered First-Class Mail Overnight Mail Facsimile – 208-765-5117
John A. Cafferty and Patrick Braden Kootenai County Legal Services P. O. Box 9000 Coeur d'Alene, ID 83816	☐ ☒ ☐ ☐	Hand-delivered First-Class Mail Overnight Mail Facsimile – 208-446-1621
John F. Magnuson Attorney At Law 1250 Northwood Center Ct., Suite A P. O. Box 2350 Coeur d'Alene, ID 83816	☐ ☒ ☐ ☐	Hand-delivered First-Class Mail Overnight Mail Facsimile – 208-667-0500
Joann Schaller, Court Reporter Kootenai County District Court 324 W Garden Avenue P. O. Box 9000 Coeur d'Alene, ID 83816-9000	☐ ☒ ☐ ☐	Hand-delivered First-Class Mail Overnight Mail Facsimile

MISCHELLE R. FULGHAM
PETER J. SMITH IV

JOHN F. MAGNUSON
Attorney at Law
P.O. Box 2350
1250 Northwood Center Court, Suite A
Coeur d'Alene, ID 83814
Phone: (208) 667-0100
Fax: (208) 667-0500
ISB #4270

Attorney for Intervenors Coeur d'Alene Land Company and H. F. Magnuson

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., a non-profit corporation; NORBERT and BEVERLY TWILLMANN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON,

Plaintiffs/Respondents,

vs.

KOOTENAI COUNTY, a political subdivision of the State of Idaho acting through the KOOTENAI COUNTY BOARD OF COMMISSIONERS; S.J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS, in their official capacities; and KATIE BRODIE, personally and individually,

Defendants,

NO. CV-06-8574

NOTICE OF APPEAL ON BEHALF OF INTERVENORS COEUR D'ALENE LAND COMPANY AND H. F. MAGNUSON

FEE CATEGORY: T
FILING FEE: $86.00
$15.00

and

COEUR D'ALENE LAND COMPANY, and H. F. MAGNUSON,

Intervenors/Appellants,

and

POWDERHORN COMMUNITIES, LLC and HEARTLAND, LLC,

Interventors.

TO: NEIGHBORS FOR RESPONSIBLE GROWTH; PRESERVE OUR RURAL COMMUNITIES; KOOTENAI ENVIRONMENTAL ALLIANCE, INC.; NORBERT AND BEVERLY TWILLMANN; GREG AND JANET TORLINE; SUSAN MELKA; and MERLYN AND JEAN NELSON, PLAINTIFFS, AND YOUR ATTORNEY OF RECORD, SCOTT W. REED;

AND TO: KOOTENAI COUNTY; KOOTENAI COUNTY BOARD OF COMMISSIONERS; S. J. "GUS" JOHNSON, CHAIRMAN; ELMER R. "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS; DEFENDANTS, AND YOUR ATTORNEYS OF RECORD, JOHN CAFFERTY AND PATRICK BRADEN;

AND TO: POWDERHORN COMMUNITIES, LLC; and HEARTLAND, LLC; INTERVENORS, AND YOUR ATTORNEYS OF RECORD, MISCHELLE R. FULGHAM AND LUKINS & ANNIS, P.S.

Notice is hereby given that:

1. The following individuals previously intervened in this matter in proceedings before the District Court. Their capacity in said proceeding was in the nature of Intervenors/Respondents. They are also referred to in proceedings before the District Court as "Intervenors." The Appellants to this Notice of Appeal are as follows:

INTERVENOR COEUR D'ALENE LAND COMPANY; AND
INTERVENOR H. F. MAGNUSON.

2. The above-named Appellants appeal against the following parties characterized as Plaintiffs/Petitioners:

NEIGHBORS FOR RESPONSIBLE GROWTH;
PRESERVE OUR RURAL COMMUNITIES;
KOOTENAI ENVIRONMENTAL ALLIANCE, INC.;
NORBERT AND BEVERLY TWILLMANN;
GREG AND JANET TORLENE;
SUSAN MELKA; AND
MERLYN AND JEAN NELSON

3. The above-named Appellants appeal from the following orders and judgments entered by the District Court, the Honorable Charles W. Hosack presiding:

(1) Memorandum Decision of July 25, 2007;

(2) Judgment of August 15, 2007; and

(3) Judgment of August 29, 2007.

4. Appellants have a right to appeal to the Idaho Supreme Court pursuant to Idaho Appellate Rule 11, including but not limited to Rule 11(f).

5. The issues on appeal shall include, but not be limited to, the following:

(a) Whether the District Court erred by granting a stay.

(b) Whether the District Court erred by refusing to impose terms when granting a stay.

(c) Whether the District Court erred by allowing the Plaintiffs to Amend their Petition for Judicial Review unilaterally, without notice to the parties, without the opportunity to object or respond, without judicial notice or approval, and after the applicable statutory deadlines had expired.

(d) Whether the District Court erred by allowing the Plaintiffs to Amend their Petition for Judicial Review to add a declaratory relief claim after the deadline for filing an appeal had passed.

(e) Whether the District Court lacked jurisdiction over the Plaintiffs' Petition for Judicial Review.

(f) Whether the District Court erred in deciding a legislative matter through an appeal under the Local Land Use Planning Act (LLUPA) and the Administrative Procedures Act (APA).

(g) Whether the District Court erred by determining an amendment to the Comprehensive Plan Land Use Map was a quasi-judicial matter and not a legislative matter.

(h) Whether the District Court erred by allowing Plaintiffs to submit and argue evidence not in the Agency Transcript or Agency Record on a Petition for Judicial Review.

(I) Whether the District Court erred by *sua sponte* raising a new issue for the first time on appeal during the final hearing on the merits when the issue was not previously raised by the Plaintiffs before the agency and was not previously raised in any of Plaintiffs' briefing or arguments.

(j) Whether the District Court erred by holding that Idaho Code 67-6509(b) requires additional public hearings beyond the five hearings held by Kootenai County.

(k) Whether the District Court erred by holding that zone change standards and legal authorities applied to a Comprehensive Plan amendment.

(l) Whether the District Court erred in its interpretation of Idaho Code 67-6509(b) by requiring that the Kootenai County Commissioners decide and announce the rejection of a Planning Commission recommendation before the County Commissioners held a public hearing to obtain public testimony and evidence to support the Commissioners' previously issued decision of rejection.

(m) Whether the District Court erred by holding the facts of this case are identical to the facts before the Supreme Court in *Price v. Payette County*, 131 Idaho 426 (1998) when that case involved an appeal of a quasi-judicial zone change and this case did not.

(n) Whether the District Court erred in holding that this case involved a material change to the Comprehensive Plan which required an additional hearing under *Price v. Payette County* and Idaho Code 67-6509(b).

(o) Whether the District Court erred in not affirming the agency action when the appellants suffered no prejudice of any substantial right, and did not argue or assert any prejudice of a substantial right.

(p) Whether the District Court erred in allowing Plaintiffs to proceed with an appeal under LLUPA and the APA when Plaintiffs did not timely seek judicial review within 28 days of the agency issuing the decision being appealed.

This list of issues on appeal shall not prevent the Appellants from asserting other issues on appeal, whether or not subsumed in or related to the foregoing.

6(a). Is a reporter's transcript requested? Yes.

(b). The appellant requests the preparation of the following portions of the reporter's transcript:

Hearing Transcript from Motion for Intervention and Stay (Dec. 18, 2006)

Hearing Transcript from Motion to Dismiss for Lack of Jurisdiction (Feb. 27, 2007)

Hearing Transcript from Motion to Dismiss for Lack of Jurisdiction, Motion to Strike Amended Petition, Objection to Amended Petition, Motion to Dismiss and Objection to Alternative Motion for Leave to Amend Petition for Judicial Review (May 31, 2007)

Hearing Transcript from Final Hearing on the Merits of Petition for Judicial Review (June 5, 2007).

7. The Appellant requests the following documents to be included in the clerk's (agency's) record in addition to those automatically included under Rule 28, I.A.R.

NO.	DOCUMENT TITLE	FILED/ENTERED
1.	Petition for Judicial Review	Nov. 15, 2006
2.	Petitioners' Motion for Stay	Dec. 8, 2006
3.	Petitioners' Brief in Support of Motion for Stay	Dec. 11, 2006
4.	Motion to Intervene as of Right, Motion for Permissive Intervention	Dec. 14, 2006
5.	Memorandum in Support of Motion to Intervene as of Right, Motion for Permissive Intervention	Dec. 14, 2006
6.	*Affidavit of Mischelle* R. Fulgham In Support of Motion to Intervene as of Right, Motion for Permissive Intervention	Dec. 14, 2006
7.	Powderhorn Communities LLC and Heartland LLC's Memorandum In Opposition To Motion For Stay	Dec. 15, 2006

8.	Affidavit of Steve Walker	Dec. 15, 2006
9.	Order Granting Motion to Intervene and Granting Motion to Stay	Dec. 19, 2006
10.	Notice of Settlement and Filing of Agency Record and Transcript	Jan. 10, 2007
11.	Agency Record, Volumes 1 through 6	Jan. 10, 2007
12.	Agency Transcript, Volume 1	Jan. 10, 2007
13.	Supplemental Agency Transcript, Volume 1	Jan. 10, 2007
14.	Powderhorn Communities LLC and Heartland LLC's Motion to Dismiss Due to Lack of Jurisdiction	Jan. 29, 2007
15.	Powderhorn Communities LLC and Heartland LLC's Memorandum In Support of Motion to Dismiss Due to Lack of Jurisdiction	Jan. 29, 2007
16.	Amended Petition for Judicial Review	Feb. 5, 2007
17.	Petitioners' Opening Brief	Feb. 14, 2007
18.	Notice of Hearing for 2/27/07 at 3:30 p.m.	Feb. 16, 2007
19.	Motion to Intervene as a Right and/or Motion for Permissive Intervention	Feb. 16, 2007
20.	Memorandum in Support of Motion to Intervene as a Right and/or Motion for Permissive Intervention	Feb. 16, 2007
21.	Brief of Petitioners in Opposition to Intervenors' Motion to Dismiss for Lack of Jurisdiction	Feb. 16, 2007
22.	Powderhorn Communities LLC and Heartland LLC's Reply Memorandum In Support of Motion to Dismiss Due to Lack of Jurisdiction	Feb. 23, 2007
23.	Objection to Amended Petition for Judicial Review/ Motion to Strike Amended Petition	Feb. 27, 2007

24.	Order Re: Motion to Intervene	Feb. 28, 2007
25.	Response to Plaintiffs/Petitioners to Intervenors/ Respondent Powderhorn Communities, LLC Objection to Amended Petition for Judicial Review/Motion to Strike Amended Petition	Mar. 5, 2007
26.	Order Granting Motion to Intervene	Mar. 6, 2007
27.	Notice of Hearing for 6/5/07 at 3:30 p.m.	Mar. 14, 2007
28.	Respondent's Brief	Mar. 14, 2007
29.	Notice of Hearing Alternative Motion to Amend	Apr. 6, 2007
30.	Alternative Motion for Leave to Amend	Apr. 6, 2007
31.	Points and Authorities of Plaintiffs/Petitioners in Support of Motion to Amend	Apr. 6, 2007
32.	Memorandum in Support of Motion to Strike	Apr. 27, 2007
33.	Intervenors' Brief in Opposition to Petition for Judicial Review	Apr. 27, 2007
34.	Joinder in Motion to Strike	May 4, 2007
35.	Response Brief of Intervenors Coeur d'Alene Land Company and H. F. Magnuson	May 4, 2007
36.	Notice of Hearing on the Merits for 6/5/07 at 3:30 p.m.	May 16, 2007
37.	Amended Notice of Hearing for 5/31/07 at 10:00 a.m.	May 16, 2007
38.	Objection to Alternative Motion for Leave to Amend Petition for Judicial Review	May 16, 2007
39.	Notice of Hearing for 5/31/07 at 10:00 a.m.	May 21, 2007
40.	Motion to Dismiss by Intervenors Coeur d'Alene Land Company and H. F. Magnuson	May 21, 2007
41.	Objection to Alternative Motion for Leave to Amend Petition for Judicial Review	May 21, 2007

42.	Memorandum of Plaintiff/Petitioner in Opposition to Intervenors' Motion to Strike for Hearing 5/31/07	May 24, 2007
43.	Petitioners' Brief on Intervenors' Motion to Dismiss and Petitioners Motion for Leave to Amend for Hearing 5/31/07	May 24, 2007
44.	Powderhorn and Heartlands' Reply Memorandum in Support of Motion to Dismiss the Amended Petition for Judicial Review	May 30, 2007
45.	Petitioners' Reply Brief	May 30, 2007
46.	Post-Hearing Brief of Plaintiffs/Petitioners	June 11, 2007
47.	Kootenai County's Supplemental Briefing	June 12, 2007
48.	Intervenors' Powderhorn and Heartlands' Supplemental Brief Regarding Idaho Code 67-6509	June 13, 2007
49.	Post-Hearing Supplemental Memorandum of Authorities Submitted on Behalf of Intervenors Coeur d'Alene Land Company and H. F. Magnuson	June 13, 2007
50.	Kootenai County's Response to Submission of Supplemental Briefing	June 19, 2007
51.	Intervenors Powderhorn and Heartlands' Response to Post-Hearing Brief of Plaintiffs	June 20, 2007
52.	Memorandum Decision	June 25, 2007
53.	Judgment	August 15, 2007
54.	Objection to proposed Judgment Award of Costs	August 16, 2007
55.	Stipulation Re Judgment Entered on August 15, 2007	August 24, 2007
56.	Judgment	August 29, 2007

8. I certify:

(a) A copy of this notice of appeal has been served on the reporter.

(b) The clerk of the district court was paid the estimated fee of $780 for preparation of the reporter's transcript by Intervenors/Appellants Powderhorn Communities, LLC and Heartland, LLC, who separately and previously filed their own Notice of Appeal.

(c) The estimated fee for preparation of the clerk's or agency's record was $115 and has been paid by Intervenors/Appellants Heartland, LLC and Powderhorn Communities, LLC as part of their Notice of Appeal separately and previously filed.

(d) The appellate filing fee of $86.00 has been paid, together with the ancillary filing fee of $15.00.

(e) Service has been made upon all parties required to be served pursuant to IAR 20.

DATED this 31st day of August, 2007.

JOHN F. MAGNUSON, Attorney for
Intervenors Coeur d'Alene Land Company and
Harry F. Magnuson

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served upon the following, **by U.S. Mail, postage prepaid** this 31st day of August, 2007:

Scott W. Reed
Attorney at Law
P.O. Box A
Coeur d'Alene, ID 83816
Fax: 208\765-5117

Mischelle Fulgham
Lukins & Annis, PS
1600 Washington Trust Financial Center
717 W. Sprague Avenue
Spokane, WA 99201-0466
Fax: 509\747-2323

John A. Cafferty and Patrick Braden
Kootenai County Legal Services
451 Government Way
P.O. Box 9000
Coeur d'Alene, ID 83816-9000
Fax: 208\446-1621

Joann Schaller, Court Reporter
Kootenai County District Court
324 W. Garden Avenue
P.O. Box 9000
Coeur d'Alene, ID 83816-9000

CDALAND HFM - NOT APPEAL.wpd

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NEIGHBORS FOR RESPONSIBLE GROWTH, et al Plaintiffs/Appellants, vs. KOOTENAI COUNTY, Defendant/Respondent.	CIVIL CASE NO. CV-06-8574 CERTIFICATE OF EXHIBITS

I, DANIEL J. ENGLISH, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the attached list of exhibits is a true and accurate copy of the exhibits being forwarded to the Supreme Court of Appeals.

I FURTHER CERTIFY that the following documents will be submitted as exhibits to the Record:

1. TRANSCRIPTS — Filed January 10,2007
2. SUPPLEMENTAL TRANSCRIPT — Filed January 10, 2007
3. AGENCY RECORD — Filed January 10, 2007
4. KOOTENAI COUNTY COMPREHENSIVE PLAN

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Kootenai County, Idaho this 21 day of Nov, 2007.

DANIEL J. ENGLISH
Clerk of District Court

By: Corinne Bottles

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IN THE SUPREME COURT OF THE STATE OF IDAHO

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit Unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., A on-profit corporation; NORBERT and BEVERLY TWILLMAN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON, Plaintiffs/Respondents, vs KOOTENAI COUNTY, a political Subdivision of the STATE OF IDAHO acting through the KOOTENIA COUNTY BOARD OF COMMISSIONERS; S.J. "Gus" JOHNSON, CHAIRMAN; ELMER R "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS in their official capacities; and KATIE BRODIE, personally and individually, Defendants, and POWDERHORN COMMUNITIES LLC, and HEARTLAND LLC Interveners/Appellants and COEUR D'ALENE LAND COMPANY, and H.F. MAGNUSON Interveners	SUPREME COURT NO. 34591 & 34592

CLERK'S CERTIFICATE

I, Daniel J. English, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the above and foregoing record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I further certify that exhibits were offered in this case.

I certify that the Attorneys for the Appellant and Respondent were notified that the Clerk's Record was complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail, postage prepaid. on the 29 day of Nov, 2007.

I do further certify that the Clerk's Record will be duly lodged with the Clerk of the Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai County, Idaho this 29 day Nov, 2007.

DANIEL J. ENGLISH
Clerk of the District Court

By: Cathy Victorino
Deputy Clerk

IN THE SUPPREME COURT OF THE STATE OF IDAHO

NEIGHBORS FOR RESPONSIBLE GROWTH, a non-profit unincorporated association; PRESERVE OUR RURAL COMMUNITIES, a non-profit Unincorporated association; KOOTENAI ENVIRONMENTAL ALLIANCE, INC., A on-profit corporation; NORBERT and BEVERLY TWILLMAN; GREG and JANET TORLINE; SUSAN MELKA; MERLYN and JEAN NELSON,

Plaintiffs/Respondents,

vs

KOOTENAI COUNTY, a political Subdivision of the STATE OF IDAHO acting through the KOOTENIA COUNTY BOARD OF COMMISSIONERS; S.J. "Gus" JOHNSON, CHAIRMAN; ELMER R "RICK" CURRIE and KATIE BRODIE, COMMISSIONERS in their official capacities; and KATIE BRODIE, personally and individually,

Defendants,

and

POWDERHORN COMMUNITIES LLC, and HEARTLAND LLC

Interveners/Appellants

and

COEUR D'ALENE LAND COMPANY, and H.F. MAGNUSON

Interveners

SUPREME COURT NO.
34591 & 34592

CLERK'S CERTIFICATE OF SERVICE

I, Daniel J. English, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that I have personally served or mailed, by United States mail, one copy of the Clerk's Record to each of the Attorneys of record in this cause as follows:

Mischelle R Fulgham
250 Northwest Blvd Ste 102
Coeur d'Alene ID 83814

Scott Reed
PO Box A
Coeur d'Alene ID 83816

John F Magnuson
PO Box 2350
1250 Northwood Center Ste A
Coeur d'Alene ID 83814

Patrick Braden
451 Government Way
PO Box 9000
Coeur d'Alene ID 83816

IN WITNESS WHEREOF, I have unto set my hand and affixed the seal of the said Court this 29 day of Nov, 2007.

Daniel J. English
Clerk of the District Court

by: Cathy Victorino